INDIAN CLAIMS COMMISSION

PEEPEEKISIS FIRST NATION INQUIRY
FILE HILLS COLONY CLAIM

PANEL

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PEEPEEKISIS FIRST NATION INQUIRY
FILE HILLS COLONY CLAIM
SASKATCHEWAN

The report may be cited as Indian Claims Commission, *Peepeekisis First Nation File Hills Colony Inquiry Report* (Ottawa, March 2004).

Panel: Commissioner A. Holman (Chair), Chief Commissioner R. Dupuis, Commissioner S. Purdy

Treaties – Interpretation – Treaty No. 4 (1874); Reserves – Disposition; Indian Act – Subdivision – Allocation – Membership; Fiduciary Duty; Defences – Res Judicata; Compensation – Criteria; Mandate – Delay – Constructive Rejection; Evidence – Community Evidence – Burden of Proof

In April 1986, the Peepeekisis First Nation submitted a claim to the Minister of Indian and Northern Affairs seeking compensation for Canada's actions in creating and implementing the File Hills Scheme on its reserve (IR) 81. After 15 years without a decision of the Minister, the First Nation requested and was granted an inquiry by the ICC. The ICC panel ruled that it had the jurisdiction to inquire into the claim on the basis of constructive rejection and subsequently declined Canada's request to reconsider its decision. In December 2001, Canada rejected the claim. The community session was held at the Peepeekisis community in September 2002. Following a ruling to admit further documents from Canada, the oral hearing took place in April 2003.

Background

The Peepeekisis Band descended from a Cree band whose Chief, Can-ah-ha-cha-pew, signed Treaty 4 in 1874. The Peepeekisis reserve, IR 81, is located in the File Hills region of Saskatchewan, about 20 miles northeast of Fort Qu'Appelle. The reserve of 26,624 acres is at the south end of four contiguous reserves. Peepeekisis members farmed productively on the reserve until the late 1800s, when the population started to decline. From 1894 to 1935, the Band had no recognized leadership. In 1898, Indian Agent William Graham established a plan, called the File Hills Scheme, to bring Indian graduates of industrial schools, who were members of other bands, to live and farm on the Peepeekisis reserve. The File Hills Scheme was a unique experiment in Canada to further the education of Indians and their assimilation into the non-Indian way of life. Indian Agent Graham strictly controlled the everyday lives of Peepeekisis band members.

In 1902, the Crown subdivided 7,680 acres of prime agricultural land at the southeast end of the reserve into 96 lots of 80 acres each. This area became known as the File Hills Colony. By then, 15 industrial school graduates were settled and farming on these lots. The Department of Indian Affairs knew of Graham's Scheme and actively encouraged it, as evidenced by departmental correspondence, approvals for two subdivisions, and the transfer to Graham of the majority of funds set aside to assist Indian graduates in farming.

In 1906, a second subdivision of the reserve for the purpose of the Colony left only 29 per cent, or 7,784 acres of the original 26,624 acres, not subdivided. By then, the Colony had absorbed most of the good agricultural land on the reserve. By 1906, male industrial school graduates started to outnumber male *original* Peepeekisis band members, gradually enabling the transferees to control band decisions.

Graham arranged meetings of band members to obtain approval for the transfer of memberships of the graduates into the Band. In 1911, the department and Graham presented the Band with the "Fifty Pupil Agreement," whereby, upon payment of $20 to each band member, the department would have the exclusive right to transfer into the Band up to 50 more industrial school graduates and their families and to locate them on any quantity of unoccupied land, anywhere on the reserve. The 1911 Agreement, approved after two or more meetings, stated that the Band itself was now known as the File Hills Colony.

The File Hills Colony prospered for several years, but the *original* members, now a minority living in the northwest corner of the reserve, complained to officials about their treatment and protested the validity of the transferees' memberships in the Band. As a result, four investigations into Peepeekisis band membership took place during the 1940s and 1950s. In 1955, the Bethune, Cory, and McCrimmon Committee, having found that Graham and the department had breached Treaty 4 and the *Indian Act*, recommended compensation to the *original* members.

Settlement negotiations failed, and the department's registrar ruled in favour of the validity of the transferees' memberships. The *original* members requested a review of this decision, whereupon Judge McFadden conducted a hearing in 1956 and confirmed the validity of all the protested memberships.

Issues

(1) Has Canada breached a lawful obligation to the Peepeekisis First Nation in respect of Canada's decision to undertake and implement the File Hills Scheme? (2) If yes, what is the nature of the breach or breaches, and what are the appropriate criteria to compensate the Peepeekisis First Nation and its members for the breach or breaches? (3) If no, do Canada's actions give rise to a claim under the heading "Beyond Lawful Obligation," as outlined in the Native Claims Policy? (4) If they do, what would be the appropriate criteria to compensate the Peepeekisis First Nation and its members?

Findings

The Crown's Decision to Undertake the Scheme on the Peepeekisis Reserve

When the Crown decided to create a farming scheme on the Peepeekisis reserve in 1898, it breached the terms of Treaty 4. The treaty provides that reserve land can be sold, leased, or "otherwise disposed of" only with the prior consent of the Indians entitled to it. The words of a treaty are to be given the sense that they would naturally have had for the parties. The Crown intended a disposition when it created a scheme that necessitated giving exclusive use and control of reserve land to non-band individuals. There is no evidence that Graham received prior consent of the Band before establishing the Scheme on its reserve.

By its decision to create the Scheme at Peepeekisis without prior consent, the Crown also breached the *Indian Act*. The *Act* is based on the policy of general inalienability of Indian lands, except to the Crown, in order to prevent the erosion of the Indian land base. The File Hills Scheme was intended to be permanent and its success was premised on the need to separate the Colony of industrial school graduates from the perceived negative influences of the *original* band members. By focusing entirely on the interests of the graduate farmers, the Crown neglected to protect the interests of the Band from the erosion of its land base. Without the collective consent of the Band, the Crown was in breach of its statutory obligations.

Where there has been no surrender of a reserve, the Crown is also under a fiduciary duty to use ordinary diligence to avoid invasion or destruction of a band's quasi-proprietary interest by an exploitative bargain with third parties or the Crown itself. The lack of recognized band leadership during the critical years enhanced the Crown's obligation to protect this Band from an exploitative arrangement. In 1898, the Band's understanding of the Crown's decision to create the Scheme and of its potential impact on the Band's land base and identity was largely non-existent. Thus, no valid consent to the Scheme itself did or could exist. The Scheme was devised to benefit other Indians; in contrast, the *original* members became gradually dispossessed of almost three-quarters of their reserve land. They were pressured to relocate to inferior land in the northwest corner of the reserve and, compared to the graduate farmers, suffered economically. The Scheme also resulted in the gradual takeover and control of band affairs by the graduates as they transferred into the Band. The Crown used the Band's farm land for the Scheme, instead of non-reserve, Crown land, primarily for financial reasons. For all these reasons, the Crown breached its fiduciary obligation to the Band.

The Crown's Methods of Implementing the File Hills Scheme

Placement of non-band members: By bringing Indians who were not members of the Peepeekisis Band to settle and farm on the Peepeekisis reserve without first having received permission from the superintendent general, the Crown, through Graham, breached the *Indian Act*.

Subdivisions: When the Crown proceeded to subdivide the reserve lands in 1902 and 1906 without the Band's consent, it did not breach its lawful obligation to the Band. Although the treaty is silent on the question of subdivision, the *Indian Act* gave the superintendent general the unilateral authority to subdivide the whole or any portion of a reserve.

Allocations: The Crown's actions in allocating lots to the graduate farmers transformed the Band's collective interest in land to an individual interest, contrary to the principle in Treaty 4 that preserves a band's right to decide collectively on the disposition of its land. The *Indian Act* reflects the treaty's objectives by providing that reserve land could be allocated to individual members in only one of two ways, either by Location Ticket or, for lots of 160 acres or less, by Certificate of Occupancy. The former required band or band council consent and the superintendent general's approval; the latter required only approval of the Indian commissioner. The Crown allocated lots to the graduate farmers without meeting or trying to meet these statutory requirements. No evidence exists that Location Tickets or Certificates of Occupancy were issued to the graduates before they were located on lots.

The Crown also breached its fiduciary obligation to the Band when it allocated reserve land to the graduates, by failing to protect the Band's interest in its reserve from invasion or destruction. The right of a band to use and occupy its reserve land is a legal, collective right and requires the band's consent if that right is to be shifted to an individual right. Each allocation amounted to a *de facto* disposition of reserve land, and each disposition therefore affected the legal interest of the Band in its reserve. The Band permanently lost its collective right to use and occupy the land allocated to the graduates.

Special assistance: Although the Crown provided special assistance to the graduate farmers that was not available to farmers outside the Colony, the evidence suggests that it was in the nature of a loan, not a gift. Further, there is insufficient evidence to conclude that, by providing special assistance, the Crown breached a fiduciary obligation to the original Band.

Membership transfers: The validity of the graduates' memberships in the Peepeekisis Band, reviewed by Judge McFadden in 1956, is not open to investigation by the ICC, based on the doctrine of *res judicata* or issue estoppel (the matter having already been decided). Judge McFadden rendered a judicial judgment that was a final, *in rem* decision on membership validity. *Res judicata*, however, does not prevent the ICC from inquiring into Graham's conduct in procuring membership transfers and the 1911 Fifty Pupil Agreement in order to determine if the Crown breached its fiduciary obligation. By taking advantage of a vulnerable band without leadership, by controlling membership meetings, and by following highly questionable practices in procuring the transfers and the 1911 Agreement – thereby artificially increasing the membership in the Band – the Crown, through Graham's actions, breached its fiduciary obligation to the Band.

The defence of *res judicata* has no application to the issues of breach of treaty, *Indian Act* (other than the membership provisions), and the Crown's fiduciary obligation in creating the File Hills Scheme. These issues were either not before Judge McFadden or, at best, collateral to the main question. Consent of the Band was consent to the membership transfers only; it was not retroactive consent to the creation of the farming Scheme and the disposition of the Band's reserve land. *Res judicata* should be applied narrowly in a land claims process created by the government to resolve specific claims in a fair and equitable manner.

These findings make it unnecessary to address the claim under the heading"Beyond Lawful Obligations." Further, the panel declines to make findings on applicable compensation criteria without more extensive argument.

Recommendation
That the Peepeekisis First Nation's File Hills Colony claim be accepted for negotiation under Canada's Specific Claims Policy.

Cases Referred to
Delgamuukw v. British Columbia, [1997] 3 SCR 1010; *R. v. Marshall*, [1999] 3 SCR 456; *Opetchesaht Indian Band v. Canada*, [1998] 1 CNLR 134; *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Badger*, [1996] 1 SCR 77; *R. v. Cote*, [1996] 3 SCR 139; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (referred to as *Apsassin)*; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Kingfisher v. Canada*, [2002] FCA 221; *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 (Sask. QB); *Joe v. Findlay* (1981), 122 DLR (3d) 377 (BCCA); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460; *Henderson v. Henderson*, [1843–60] All. ER Rep. 378 (Ch.); *Maynard v Maynard*, [1951] SCR 34; *Angle v. Minister of National Revenue*, [1975] 2 SCR 248; *Schweneke v. Ontario* (2000), 47 OR (3d) 97 (Ont. CA); *Minott v. O'Shanter Development Co.* (1991), 42 OR (3d) 321; *Law v. Hansen* (1895), 25 SCR 69; *Re Indian Act; Re Poitras* (1956), 20 WWR 545 (Sask. Dist. Ct); *In Re Wilson* (1954), 12 WWR 676 (Alta Dist. Ct).

ICC Reports Referred to
ICC, *Roseau River Anishinabe First Nation Inquiry Report on Medical Aid Claim* (Ottawa, February 2001), reported (2001) 14 ICCP 3; ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101; ICC, *Carry the Kettle First Nation Cypress Hills Claim Inquiry Report* (Ottawa, July 2000), reported (2000) 13 ICCP 209; ICC, *Lucky Man Cree Nation Treaty Land Entitlement Inquiry Report* (Ottawa, March 1997), reported (1998), 6 ICCP 109; ICC, *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry Report* (Ottawa,

November 1996), reported (1998) 6 ICCP 21; ICC, *Alexis First Nation TransAlta Utilities Rights of Way Inquiry Report* (Ottawa, March 2003), to be reported in (2004) 17 ICCP.

Treaties, Statutes, Regulations Referred to

Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice (Ottawa: Queen's Printer, 1966). *Constitution Act, 1982*, s. 35(1); *Indian Act*, RSC 1886, c. 43 ss. 2, 15, 16, 17, 21, 140, as amended by SC 1890, c. 29, s. 2, SC 1894, c. 32, s. 2, and SC 1895, c. 35, s. 8; *An Act to amend "The Indian Act,"* SC 1887, c. 33, s. 1; *Indian Act*, RSC 1906, c. 81, ss. 20, 21, 22; *Indian Act*, RSC 1951, c. 29, s. 20; RSC 1952, c. 149, s. 9, as amended by SC 1956, c. 40, s. 2; *Indian Act*, RSC 1970, c. I-6, s. 20(1); *Inquiries Act*, RS 1952, c. 154, ss. 4, 5.

Secondary Sources Referred to

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; *Black's Law Dictionary*, 7th ed.; *Roget's Thesaurus of English Words and Phrases* (London: Longman Group, 1987); Marion Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996; Sarah Carter, "Demonstrating Success: The File Hills Farm Colony" (fall 1991) 16 no. 2 *Prairie Forum*; Donald J. Lange, *The Doctrine of* Res Judicata *in Canada* (Toronto: Butterworths, 2000); John Sopinka, Sydney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999); George Spencer Bower, Alexander K. Turner, and K.R. Handley, *The Doctrine of* Res Judicata, 3rd ed. (London: Butterworths, 1996).

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PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

This report deals with the inquiry of the Indian Claims Commission into the creation and implementation of what has come to be known as the File Hills Scheme on the reserve of the Peepeekisis First Nation in Saskatchewan.

One of the signatories to Treaty 4 in 1874 was Can-ah-ha-cha-pew,[1] Chief of a Cree band that shortly thereafter became known as the Peepeekisis Band when Peepeekisis was chosen Chief on Can-ah-ha-cha-pew's death. The Peepeekisis reserve, Indian Reserve (IR) 81, is the southernmost of four contiguous reserves in the File Hills region, about 20 miles northeast of Fort Qu'Appelle. The other reserves are Little Black Bear, Star Blanket, and Okanese.

The Crown, in accordance with the terms of Treaty 4, wished to encourage these people, who had long been hunters of buffalo, to adopt agriculture. By 1883, Peepeekisis band members were showing considerable promise as farmers. Ten years later, however, the population of the four File Hills Bands had decreased, and Chief Peepeekisis and his three headmen had died. The File Hills Bands started to pool their resources in order to continue a viable farming operation.

William Morris Graham arrived as Acting Indian Agent for the File Hills Agency in 1896. In furtherance of the government policy of the time to educate and assimilate Indian children, Agent Graham, with the authorization and encouragement of the Department of Indian Affairs, established a plan whereby graduates of industrial schools in the area would be located on plots of land within the Peepeekisis reserve to begin farming operations.[2] This farming colony was to be the first of several on reserves, but the Commission has not been made aware of any other similar colonies. It

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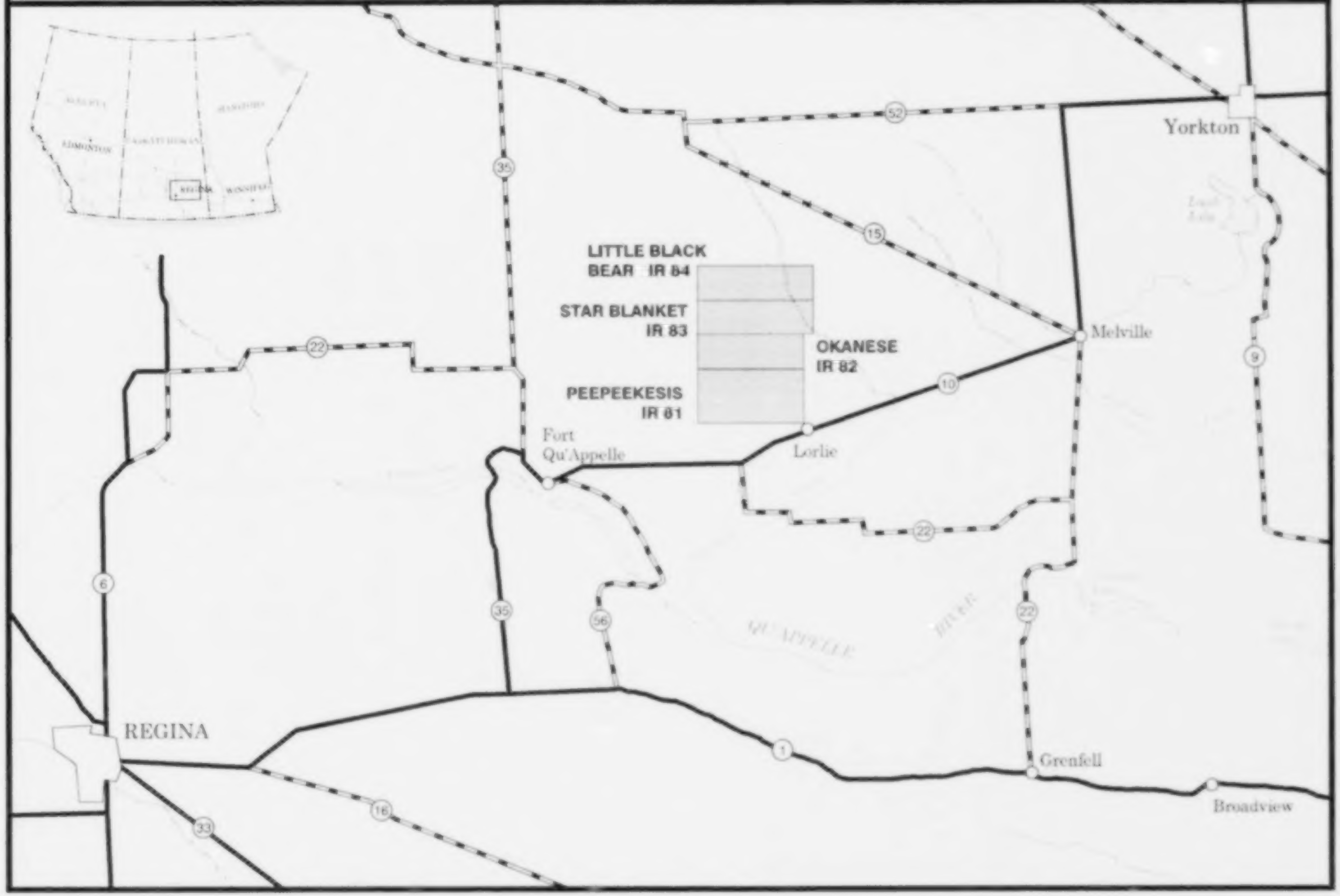
[1] Also known as Making Ready the Bow or Ready Bow. He was Peepeekisis' father.

[2] Graduates of industrial training schools were both male and female. Most references speak of young men; however, the department's Annual Reports contain some information about women graduates, including the following: "Most of the young men of this colony are married to girl graduates of schools, and, in many cases, these young women make good housewives, although there are a few who require constant supervision." W.M. Graham, Inspector of Indian Agencies, File Hills Agency, to Frank Pedley, Deputy Secretary General of Indian Affairs (DSGIA), April 18, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1910*, 133 (ICC Exhibit 1, p. 496). The historical documents indicate, however, that a woman graduate would have entered the File Hills Colony only as a dependant of her husband, her fiancé, a male member of her family, or as domestic help for another household or the Indian Agent.

Claim Area Map


ALBERTA
EDMONTON
SASKATCHEWAN
MANITOBA
REGINA
WINNIPEG
Yorkton
Leech Lake
Melville
LITTLE BLACK BEAR IR 84
STAR BLANKET IR 83
OKANESE IR 82
PEEPEEKESIS IR 81
Fort Qu'Appelle
Lorlie
QU'APPELLE RIVER
REGINA
Grenfell
Broadview
52
15
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would appear that the File Hills Scheme represents a unique sequence of events in the history of the Crown's relationship with aboriginal peoples.

The Indian Claims Commission is not the first Commission to inquire into and report on the File Hills Scheme. As a result of ongoing complaints from *original*[3] members of the Band about the methods used by the Crown to obtain memberships in the Band for the graduates of the industrial schools placed on land in the reserve, the 1940s and 1950s saw a number of internal departmental investigations and public reviews, including the McCrimmon Investigation in 1947, the Trelenberg Inquiry in 1954, and the McFadden hearing in 1956.

In April 1986, the Peepeekisis First Nation submitted a claim to the Minister of Indian and Northern Affairs seeking compensation for Canada's actions with respect to the creation and implementation of the File Hills Scheme. By 2001, the Minister had not made a decision whether to accept the First Nation's claim. On the request of the First Nation, the Indian Claims Commission decided in April 2001 to conduct an inquiry into its claim.

On September 14, 2001, the panel found that it had the jurisdiction to conduct this inquiry on the basis that the long delay in responding to the claim and Canada's breach of its numerous commitments to the First Nation amounted to a rejection of its claim.[4] Following Canada's request that the Commission reconsider its September 14, 2001, ruling, the panel reaffirmed its decision to accept jurisdiction to inquire into the First Nation's specific claim.[5] In December 2001, Canada finally provided its formal preliminary rejection of the claim. The Commission's community session took place at the Peepeekisis reserve on September 11 and 12, 2002, with both Canada and the First Nation in attendance. The First Nation filed its written submissions on October 21, 2002. Canada's written submissions followed on December 23, 2002, and the First Nation replied on January 13,

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[3] The use of the term *original* is of special significance in this report. Usually, an *original* is one who was a member of the band when the band was first created. During the community session of September 11 and 12, 2002, most elders referred to an *original* as being a person who was a band member prior to the introduction of the File Hills Colony Scheme. We have adopted this use of the word.

[4] Indian Claims Commission (ICC), Interim Ruling: Peepeekisis First Nation Inquiry, File Hills Claim (Ottawa, September 14, 2001), reproduced at Appendix A.

[5] ICC, Interim Ruling: Peepeekisis First Nation Inquiry, File Hills Claim (Ottawa, November 2001), reported (2003) 16 ICCP 111, and reproduced at Appendix B.

2003. On March 13, 2003, the panel ruled that it would admit as evidence further documents submitted by Canada on the basis of their relevance to the inquiry.[6] The oral hearing of the parties took place in Regina, Saskatchewan, on April 3, 2003.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix D of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[7] This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[8] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

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[6] Indian Claims Commission, Interim Ruling: Peepeekisis First Nation Inquiry, File Hills Claim (Ottawa, March 13, 2003), reproduced at Appendix C.

[7] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[8] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

iv) An illegal disposition of Indian land.[9]

The Commission has been asked to inquire and report on whether the Peepeekisis First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. Prior to setting out our discussion of this claim, we wish to address briefly three preliminary matters raised by the First Nation.

CANADA'S HANDLING OF THE PEEPEEKISIS FIRST NATION'S CLAIM

The handling of the Peepeekisis First Nation's claim by Canada represents a disturbing pattern of consistent and repeated delay in both the processing of this claim and Canada's participation in the Commission's inquiry process. In short, it took nearly 16 years for the First Nation to receive a formal rejection of its claim by the Government of Canada. In that time, the First Nation had to bear the burden of Canada's repeated missed commitments in responding to its claim. Moreover, Canada's failure to ensure adequate funding to the First Nation in a timely manner to enable it to participate in the Commission's inquiry process and Canada's refusal to comply with the Commission's process compounded the delay in this claim. Much of the history in this regard is summarized in the Commission's Interim Ruling of September 14, 2001.[10] Canada's response to the ruling was to advise that it would not participate in the Commission's inquiry and would not forward its documentation to the Commission. Only after releasing its preliminary position rejecting the claim in December 2001 did Canada forward its documentation.

The Commission wishes to highlight the vulnerability in which such compounded delay places a First Nation. Over the 16 years that the First Nation's claim sat in the hands of Canada's representatives, the First Nation lost many of its elders and, with the passing of each elder, the First Nation's difficulty in marshalling its case mounted.

Further, the Commission wishes to note that it expects Canada to abide by the alternative process Canada itself created in the Indian Claims Commission. It is a matter not only of good faith but of basic administrative law principles. Where Canada disagrees with a ruling of this Commission, Canada has the option of undertaking a judicial review of the decision. To disregard a ruling of this Commission should not be open to Canada.

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[9] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

[10] ICC, Interim Ruling: Peepeekisis First Nation Inquiry, File Hills Claim (Ottawa, November 2001), reported (2003) 16 ICCP 111.

COMMUNITY EVIDENCE

In their written legal submissions, the parties advanced arguments surrounding both the weight to be accorded the oral history evidence provided during the Commission's September 11 and 12, 2002, community session and the nature of the testimony provided during that session. The First Nation argued in its written legal submissions that "[t]he policy of the Commission has been to receive and consider oral evidence provided by elders. Not only is the appropriateness of that approach consistent with the Order-in-Council creating the Commission and the Commission's Guidelines but it is also consistent with the process now followed by the courts."[11] The First Nation went on to argue that, in the case of the Peepeekisis First Nation's inquiry, "it is proper for the Commission both to receive and to give significant weight to the evidence of those appearing at the Community Sessions. With few exceptions, evidence which has been provided contains details which were precise and are well within the bounds of what the Supreme Court has described as 'the flexible application of the rules of evidence.'"[12]

In its written response, Canada argued that "[t]he testimonials provided at the Community Evidence session in this inquiry, do not amount to oral history evidence as contemplated by the Supreme Court of Canada," and, furthermore, that "the jurisprudence concerning oral history evidence in the trial system is also not applicable to the context of an ISCC inquiry because of the procedural differences in the two processes."[13] Canada argued that certain procedural safeguards which test the reliability and consistency of oral history evidence and which are available to litigants within the courts are not available within the Indian Claims Commission's process. Canada went on to argue as follows:

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[11] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, paras. 27 and 28.

[12] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 30.

[13] Written Submission on Behalf of the Government of Canada, December 23, 2002, paras. 41 and 43.

> Because community evidence is based on isolated and incomplete accounts from a few individuals about events that took place many years ago often prior to their own lifetimes and because of the fragility of the human memory, no special weight should be given to such testimony. Rather, as with all evidence, it should be critically evaluated with a view to determining the proper amount of weight that can be applied to its contents.[14]

The First Nation, in its written reply to Canada's written submissions, challenged what it saw as an attempt by Canada to have the Commission disregard or minimize the evidence provided by elders at the community session. The First Nation also argued that the evidence provided by the Peepeekisis elders during the community session "is of the kind specifically recognized and accepted both by the Commission in its prior inquiries and by the Supreme Court of Canada and other courts in a number of cases."[15]

When asked by the panel during the April 3, 2003, hearing to clarify its position, counsel for Canada answered that:

> The statement that's made in paragraph 47 [of Canada's written submission] is not comparing the kinds of evidence you would find in Court or the kinds of evidence you would find – before this inquiry. It's simply making a distinction between those types of sacred litany and the type of oral history evidence which is certainly before the Courts now and also the type of oral history evidence that you have heard in this inquiry. It's to make a distinction between those kind of sacred texts as opposed to a different type of oral history evidence, not a distinction between a Court and inquiry.
>
> I'd just like to point out as well that this particular aspect of Canada's submission was in response to the First Nation's submission that suggested that Elder evidence should be given special weight and – beyond any other evidence, and so *our submission is merely that it should be given equal weight and treated equally like the other evidence, not given special weight.*"[16]

The Commission previously considered both the nature of oral history evidence taken as part of the Commission's process and the weight to be accorded to that evidence in its February 2001 report of the *Roseau River Anishinabe First Nation Inquiry: Medical Aid Claim*.[17] That inquiry involved consideration as to whether the terms of Treaty 1 included a promise to provide "medical aid." The Roseau River Anishinabe First Nation had claimed that medical aid was an unwritten, or "outside," treaty promise. That report reviewed the case law on oral history evidence pre- and post-*Delgamuukw*.[18]

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[14] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 47.

[15] Written Submission on Behalf of the Peepeekisis First Nation, January 13, 2003, para. 20.

[16] ICC Transcript, April 3, 2003, pp. 204–5 (Uzma Ihsanullah). Emphasis added.

Although the Commissioners differed in their application of the legal principles to the facts in *Roseau*, each drew upon the same statement by the Supreme Court in *Delgamuukw*:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui, supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis.[19]

As the Commission explained in the *Roseau* report, although it has accepted and applied this principle in previous inquiries, it is clear that the "equal footing" referred to by the former Chief Justice does not amount to special status, nor does it have the effect of assigning greater weight to oral history than to any other evidence.

The Commission's "Guide to Inquiry Process," provided to the parties, explains that, during the community session, "the Commissioners will visit the Community to hear oral testimony of elders, witnesses, and experts (where necessary)"[20] and that it is "an informal opportunity for members of the community to come forward with information that may assist the Commissioners."[21] The "Guide to Inquiry Process" also sets out these guidelines:

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[17] ICC, *Roseau River Anishinabe First Nation Inquiry Report on Medical Aid Claim* (Ottawa, February 2001), reported (2001) 14 ICCP 3.

[18] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

[19] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1069, Lamer CJ.

[20] ICC, "Guide to Inquiry Process" (revised December 15, 1998), p. 2.

> **Procedure for Commissioners' Visit**
> This inquiry is held under the federal Inquiries Act. It is therefore open to the Commissioners to decide how to proceed. Similarly, the Commission's Order-in-Council authorizes the Commissioners "to adopt such methods ... as they may consider expedient for the conduct of the inquiry and to sit at such times and in such places as they may decide."
>
> Every effort is made to keep the Commissioners' Visit informal so that members of the community will not be frightened or discouraged by the prospect of "testifying." The object is to avoid both the appearance and spirit of court proceedings. The Commissioners have emphasized that they are a commission of Inquiry, not a court. They are not bound by rules or customs governing courts.
>
> **a) Rules of Evidence**
> It follows that the Commissioners are not bound by rules of evidence or by court procedures governing evidence. They are free to accept any information, sworn or unsworn, that they may consider relevant to the inquiry. "Witnesses" are therefore not placed under oath; their "evidence" is led by Commission Counsel. There is no cross-examination. If counsel to the parties desire to put questions, they may do so through Commission Counsel, in accordance with the general practice of commissions of inquiry.
>
> ...
>
> **d) Elders' Circle**
> The form for a Commissioners' Visit to the Community is not set in stone. Sometimes the form of an elders' circle may be the best way to proceed.[22]

Although the Commission has a flexible process, it still operates within the context of accepted legal principles as framed by the courts. That being said, the Commission is fully aware of the difference between the evidentiary constraints that exist in court proceedings and the flexibility it enjoys under the *Inquiries Act.*

As in all inquiries of this Commission, any oral evidence submitted in the Peepeekisis First Nation Inquiry has been weighed and considered along with all the other evidence in the determination of the issues at hand. Based on the written and oral legal submissions of the parties, it is clear that they are in agreement with this basic approach to oral history evidence.

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[21] ICC, "Guide to Inquiry Process" (revised December 15, 1998), p. 5.

[22] ICC, "Guide to Inquiry Process" (revised December 15, 1998), pp. 5–6.

BURDEN OF PROOF

The written legal submissions reflect that the parties are in agreement that the burden of proof rests with the First Nation bringing forward the claim and that it is a civil standard or "balance of probabilities." In its report on the *Moosomin First Nation 1909 Reserve Land Surrender Inquiry*, the Commission concluded that "[t]he general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. The standard of proof is based on the civil standard...."[23]

The First Nation raised the further argument that, although the overall burden rests on a litigant to prove its case, the evidentiary burden may shift in the course of the case. Given our findings in other respects in this report, the Commission finds it unnecessary to address this argument.

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[23] ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 202.

PART II

HISTORICAL BACKGROUND

FORMATION AND DEVELOPMENT OF THE FILE HILLS FARMING COLONY

Peepeekisis Reserve before 1896

In 1874, Canada negotiated and signed Treaty 4 with 13 Cree and Saulteaux chiefs in what is now southern Saskatchewan. One of the signatories to this treaty was Can-ah-ha-cha-pew, Chief of a Cree band located in southern Saskatchewan.[24] When Can-ah-ha-cha-pew passed away, Peepeekisis was elected Chief in his stead, on July 22, 1880.[25] The Band would thereafter be known as Peepeekisis Band.

The same year Peepeekisis was elected, an initial survey was made of the Band's reserve according to the terms of the treaty. This rectangular plot of land was the southernmost of four contiguous reserves in the File Hills region, about 20 miles northeast of Fort Qu'Appelle (the other reserves were Little Black Bear, Star Blanket, and Okanese).[26] Upon completion of the survey in 1887 the final reserve (IR 81) would measure 41.6 square miles or 26,624 acres;[27] it was a mixture of "undulating prairie of rich black sandy loam," broken by the File Hills, poplar and willow stands, and numerous lakes and creeks.[28]

In order to encourage people who long had been buffalo hunters to move to an agricultural way of life, the treaty stipulated that the government would provide the necessary farming tools, and schooling, once the bands had settled on their reserves.[29] In 1881, a small portion of Peepeekisis'

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[24] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5 (ICC Exhibit 8, p. 4).

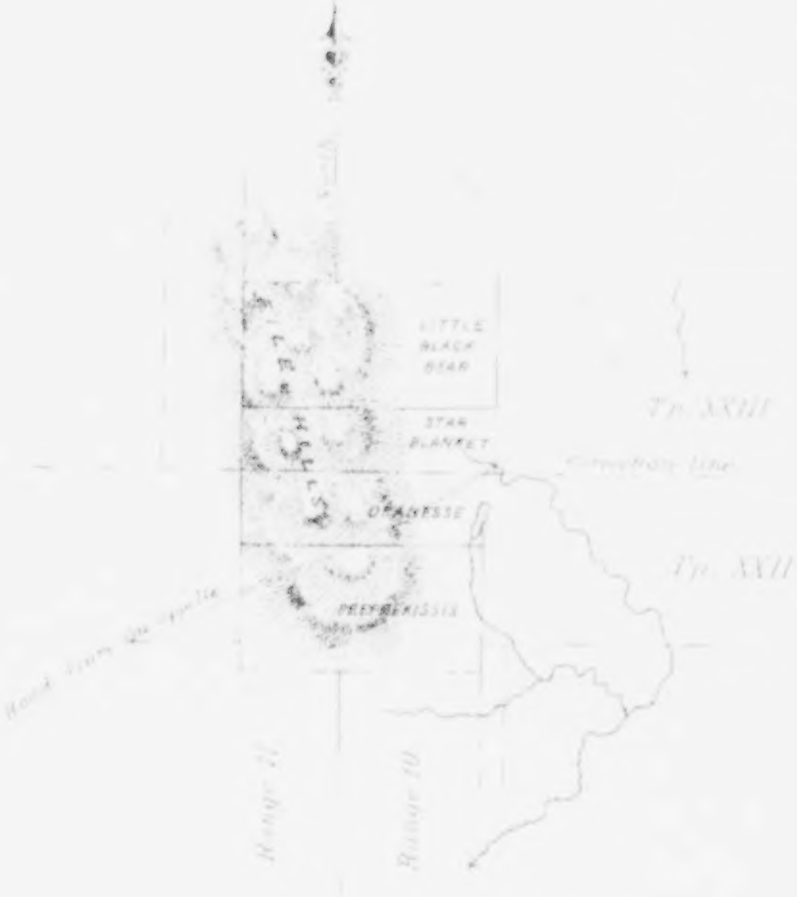
[25] Treaty annuity paylist, Peepeekisis Band, 1880, National Archives of Canada (hereafter NA), RG 10, vol. 9414 (ICC Exhibit 3E, p. 6).

[26] A.P. Patrick, Dominion Topographical Surveyor, to Edgar Dewdney, Indian Commissioner, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Exhibit 1, pp. 25–26, 35–37).

[27] G.M. Matheson, Registrar, January 23, 1935 (ICC Exhibit 1, p. 598).

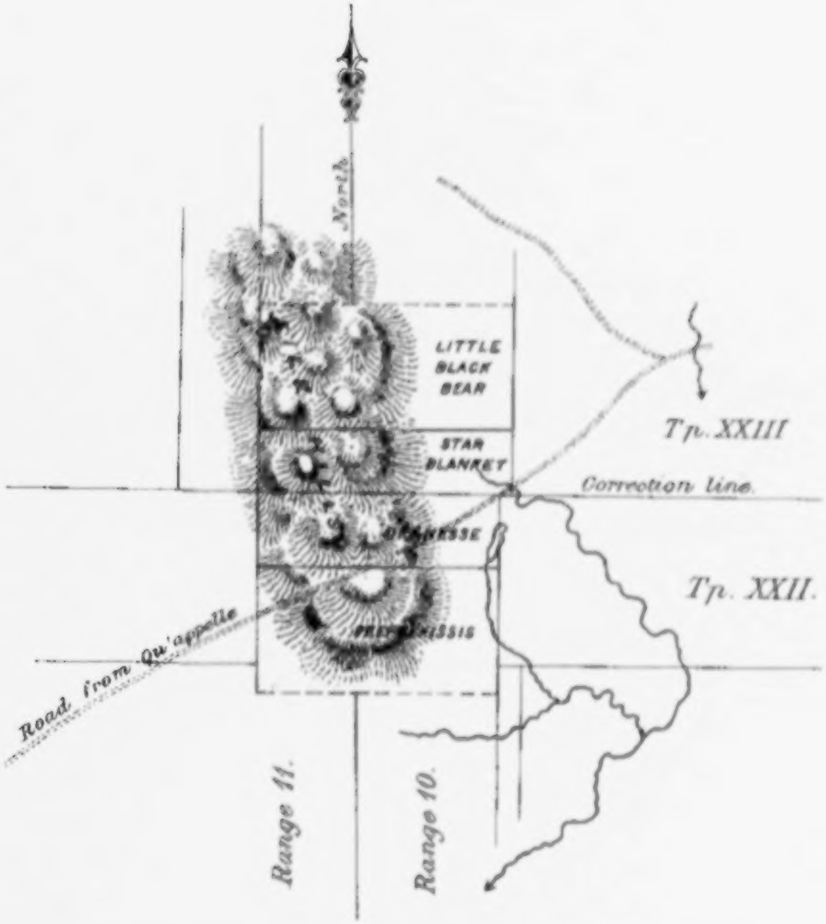
[28] Order in Council PC 1151, May 17, 1889 (ICC Exhibit 1, pp. 88–90).

[29] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7 (ICC Exhibit 8, p. 6).


LITTLE BLACK BEAR
STAR BLANKET
OKANESE
PEEPEEKISSIS
FILE HILLS
Tp. XXIII
Tp. XXII
Correction line
Road from Qu'Appelle
Range 11
Range 10

Sketch showing Reserves in the File Hills
the dotted lines are yet to be run

J. C. Nelson


North
LITTLE BLACK BEAR
STAR BLANKET
OKANESSE
PEEPEEKISSIS
Tp. XXIII
Correction line.
Tp. XXII.
Road from Qu'appelle
Range 11.
Range 10.

Sketch Showing Reserves in the File Hills,
the dotted lines are yet to be run.

J. C. Nelson
D.L.S.

Band settled on its reserve, where they were joined the following summer by their Chief.[30] A year later, in 1883, T.P. Wadsworth, Inspector of Indian Agencies, gave a positive report on the Band's farming: "[T]his band will far surpass any other in this section before very long."[31]

In their transition to agriculture, the File Hills Bands were aided by farming instructor John Nicol, who, in his May 1884 report, noted that Peepeekisis Band numbered more than 130.[32] By the mid-1890s, however, the population of the File Hills Bands had decreased, and most of the Chiefs and headmen had passed away. Peepeekisis died in 1889, and by 1894, his three headmen were also deceased.[33] According to Inspector Wadsworth's 1891 report, the combination of these factors resulted in the "Band line" in File Hills becoming "almost obliterated, their farm labor and the proceeds thereof being pooled in such a way that it is now almost impossible to define them."[34] By 1897, the year William Morris Graham was appointed Indian Agent at File Hills, the Peepeekisis Band's population was reduced to 78.[35] A May 1897 inspection report praised Graham's predecessor, A.J. McNeill, for the progress he had fostered.[36]

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[30] T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, May 30, 1883, NA, RG 10, vol. 3640, file 7452-1 (ICC Exhibit 1, p. 51).

[31] T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, May 30, 1883, NA, RG 10, vol. 3640, file 7452-1 (ICC Exhibit 1, p. 52).

[32] John Nicol, Farming Instructor, to the Indian Commissioner, May 5, 1884, NA, RG 10, vol. 3687, file 13642 (ICC Exhibit 1, p. 63).

[33] Violet Kayseass, Registration, Revenues and Band Governance, DIAND, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7).

[34] T.P. Wadsworth, Inspector of Indian Agencies, to the Indian Commissioner, December 21, 1891, NA, RG 10, vol. 3859, file 82250-7 (ICC Exhibit 1, p. 120). Elizabeth McKay may have been referring to this sharing of resources when she said: "There was no such thing as Black Bear, Star Blankets and Okanese and this here. No, there wasn't because they roamed up and down." ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 150).

[35] Alexander McGibbon, Inspector of Indian Agencies and Reserves, File Hills Agency, to Amédée E. Forget, Indian Commissioner, May 5, 1897, NA, RG 10, vol. 3906, file 105722 (ICC Exhibit 1, p. 215).

[36] Alexander McGibbon, Inspector of Indian Agencies and Reserves, File Hills Agency, to Amédée E. Forget, Indian Commissioner, May 5, 1897, NA, RG 10, vol. 3906, file 105722 (ICC Exhibit 1, p. 244).

Foundations of the File Hills Scheme, 1896–1901

Although he was Acting Indian Agent from autumn 1896, it was not until July 1897 that William Morris Graham was appointed, by Order in Council, Indian Agent "on probation" for the File Hills Agency.[37] This appointment would be confirmed in January 1900.[38] Graham soon made it clear that he meant to supervise the reserve closely. He monitored the daily activities of band members, making regular inspection visits to their homes, employing the pass system to control their travel away from the reserve,[39] and using a permit system to control their right to slaughter their cattle or sell their goods.[40] He vigorously enforced *Indian Act* regulations banning all traditional dances.[41] With time, he also became involved in arranging marriages for ex-pupils of residential schools.[42]

By 1894, Peepeekisis and his headmen had passed away, and no Chiefs or councillors would be recognized by the department until 1935.[43] Albert Miles, farming instructor at File Hills from 1901 to 1912, comments: "There was really no Chief, but Shavetail [Peepeekisis' son] was the man who was supposed to be."[44] Fred Dieter also notes that in the early 1900s "there were no Chief and

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[37] Order in Council, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 255)

[38] Order in Council, January 4, 1900, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 299). Marian Dinwoodie estimates that Graham became Acting Indian Agent in the File Hills Agency in October 1896. See Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996 (ICC Exhibit 9A, p. 4).

[39] W.M. Graham, Indian Agent, to Constable Manners, September 27, 1897, NA, RG 10, vol. 1400, p. 123 (ICC Exhibit 1, p. 263); W.M. Graham to Father Hugonard, September 28, 1897, NA, RG 10, vol. 1400, p. 124 (ICC Exhibit 1, p. 264).

[40] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 95, Jessie Dieter; p. 248, Don Koochicum). See also affidavit of Joseph B. Desnomie, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, pp. 77–78).

[41] W.M. Graham, Indian Agent, to Indian Commissioner, January 16, 1898, NA, RG 10, vol. 1400 (ICC Exhibit 1, pp. 270–76). See also ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 109–10, Jessie Dieter; p. 174, Elizabeth Pinay; p. 204, Wes Pinay).

[42] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 131–32, Elizabeth McKay; pp. 213–14, Wes Pinay; p. 369, Aubrey Goforth).

[43] Violet Kayseass, Registration, Revenues and Band Governance, DIAND, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7).

[44] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, pp. 270, 293 (ICC Exhibit 6A, pp. 280, 303, Albert Miles).

Shaftail
Peeperes. File Hills Indian family

Shaftail, Peepexes, File Hills Indian family
Provided to the ICC by Mrs Elizabeth Pinay at the community session, September 11-12, 2002.

Councillors," but adds that, "if there was any business to be carried on or any names to be signed, they always called up the old original members."[45] According to Ernest Goforth, "Mr. Graham wouldn't have a Chief. He was the Chief of all the Indians."[46] In 1912, Shave Tail complained to the department about Graham's reluctance to name him to the hereditary position as Chief of the Band held by his father and grandfather.[47] It is clear from the elders' testimonies that they considered Shave Tail to be their hereditary chief.[48] Stewart Koochicum explains: "They said Graham was the judge. He was everything. He could send them to jail without even going to Court, you know, so I don't know how – how that happened and how come he had so much power."[49] Alex Nokusis makes similar allegations: "W.M. Graham did not have respect for Indians. To oppose Graham meant a jail sentence for thirty days, starvation or whatever he had in mind for you to punish you for having dared to talk back. Graham was a dictator of the worst kind."[50] Jessie Dieter describes Indian Agent Graham's relationship with the Indians in the File Hills Bands:

> He didn't listen to them [the elders]. He never listened to the Indians. He was very mean to them, and I remember living in Star Blanket, and each – each family on Star Blanket reserve had cattle, a bunch of cattle, and sometimes we'd have a hard winter. They'd ask him if they could kill an animal, and he would say no, you keep those, that cow, keep your cattle together. I don't know why. Maybe it was for himself.[51]

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[45] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, p. 295 (ICC Exhibit 6A, p. 305, Fred Dieter).

[46] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 43 (ICC Exhibit 6A, p. 47, Ernest Goforth).

[47] Shave Tail to J.D. McLean, Department of Indian Affairs, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 549–50).

[48] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 195, Elwood Pinay; p. 264, Don Koochicum).

[49] ICC Transcript, September 11-12, 2002 (ICC Exhibit 5A, p. 267, Donald and Stewart Koochicum). See also ICC Transcript, September 11-12, 2002 (Exhibit 5A, p. 36, Mable George; pp. 52–54, Gilbert McLeod; pp. 101, 111, 119, Jessie Deiter; pp. 130, 137–39, Elizabeth McKay; pp. 163, 174, 191, Elizabeth Pinay; p. 204, Wes Pinay).

[50] Affidavit of Alex Nokusis, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, p. 61). See also affidavit of Campbell Swanson, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, pp. 70–74).

[51] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 95, Jessie Dieter).

Fred Dieter delivering welcoming address to Governor General Earl Grey, seated in back of car. File Hills Colony, 1906.
Glenbow-Alberta Archives, NA-3454-13.

In his report for the year ending June 30, 1898, Graham noted that many of the agency's children were frequenting the Qu'Appelle Industrial School and that several young couples, ex-pupils from this school, were now establishing farms on the File Hills reserves and faring well.[52] Despite Graham's statement in 1907 that Fred Dieter was "the first boy who entered the colony,"[53] our review of the record demonstrates that, in January 1898, Joseph McNabb became the first industrial school graduate from another band to transfer membership into the Peepeekisis Band.

In particular, Secretary J.D. McLean wrote to William Graham on December 28, 1897, stating that, although the department had received the consent of Petaquakey's Band to the transfer of Jose Kah-kee-key-ass, also known as Joseph McNabb, to the Peepeekisis Band, the department would also require the consent of Peepeekisis.[54] About a month later, on January 17, 1898, Graham forwarded the consent of Peepeekisis Band to admit Joseph McNabb as a band member.[55] In January 1899, Graham reported to the Secretary of the Department of Indian Affairs that he had settled four ex-pupils on the reserves (he did not indicate their band membership); he also requested that seed grain be supplied for them that spring.[56] In his 1902 report to the Superintendent General of Indian Affairs, Indian Commissioner David Laird noted that "some fifteen ex-pupil lads"[57] had been located on the subdivided farming lots on Peepeekisis reserve. Laird cited Graham's August report, which stated that "Joseph McNabb and George Little Pine started in three or four years ago; they have about forty acres of wheat in, twenty-five acres of oats and a good garden. They have broken about twenty-five acres of new land this year."[58] Laird's 1902 report is very instructive as to when the File Hills Scheme first began. In particular, the following portion of that report explains:

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[52] W.M. Graham, Indian Agent, File Hills Agency, to the Superintendent General of Indian Affairs (SGIA), August 14, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 147 (ICC Exhibit 1, p. 282).

[53] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 157 (ICC Exhibit 1, p. 479).

> The colony of this kind at File Hills has been fairly successful. To encourage it still more the department last spring had a block of twelve square miles surveyed into eighty-acre lots on Peepeekisis reserve, where the land is all that could be desired for farming purposes. Some fifteen ex-pupil lads, have been located on an equal number of these lots and have made a good beginning. They were assisted by being given horses, ploughs, harrows and some lumber and hardware for houses, the greater part of the value of which it is proposed they shall pay back to the department when their crops warrant it, the money to be used to help others to make a like start.[59]

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[54] J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Indian Agent, File Hills, December 28, 1897, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, p. 269).

[55] W.M. Graham, Indian Agent, File Hills Agency, to the Secretary, Department of Indian Affairs, January 17, 1898, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, p. 277).

[56] W.M. Graham, Indian Agent, File Hills Agency, to the Secretary, Department of Indian Affairs, January 25, 1899, NA, RG 10, vol. 1400, 670 (ICC Exhibit 1, pp. 297–98).

[57] David Laird, Indian Commissioner, to SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[58] David Laird, Indian Commissioner, to SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[59] David Laird, Indian Commissioner, to SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

What is clear from Indian Commissioner Laird's October 1902 report is that the File Hills Scheme began not only before the arrival of Fred Dieter but also well before the first subdivision of lands at Peepeekisis in June 1902. In Laird's own words, the 1902 subdivision of lands was meant to encourage still more of what was already a successful experiment of the colony system.

In January 1900 Graham's appointment as Agent was confirmed and his salary increased.[60] In September, the Secretary was informed that Graham was "doing most excellent work upon his reserve."[61] The following year, 1901, the File Hills and Muscowpetung agencies were united as the Qu'Appelle Agency; Graham was placed in charge and given another raise in salary.[62] In anticipation of the confirmation of his appointment, Graham recommended, among other things, that he be granted a share of the funds being allotted to assist ex-pupils who were establishing farms on their reserves: "I have a number of pupils who are doing well, but I feel satisfied that better results could be obtained if they were given a start by the Department."[63] Both Graham and his recommendations received approval: "The Minister considers that as Mr. Graham has done so well in advancing ex-pupils in his Agency, the bulk of the money to be provided for assisting ex-pupils should be put at his disposal so that the work may be developed in that agency and made a model for others."[64] In order "to assist such pupils in his Agency," Graham was granted $1,500 of the $2,000 that had been allotted in the budget for the assistance of ex-pupils starting up farms on their reserves.[65]

There is no indication in the department's records that the band members were consulted at any point about the Scheme. Yet, according to testimony given by Fred Dieter in the 1954

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[60] Order in Council, January 4, 1900, NA, RG 10, file 91839-7, reel C-10155 (ICC Exhibit 1, p. 299).

[61] Memorandum for the Secretary, Indian Department, September 15, 1900, NA, RG 10, vol. 3985, file 173738-1 (ICC Exhibit 1, p. 300).

[62] Order in Council, April 4, 1901, NA, RG 10, file 91839-7, reel C-10155 (ICC Exhibit 1, p. 312).

[63] W.M. Graham to SGIA, February 4, 1901, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 304).

[64] Marginal note written by J.A. McKenna to J.A. Smart on letter from W.M. Graham to SGIA, February 4, 1901, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 303).

[65] J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 2, 1901, NA, RG 10, vol. 4951, reel C-8469 (ICC Exhibit 1, p. 310 and transcript, p. 308).

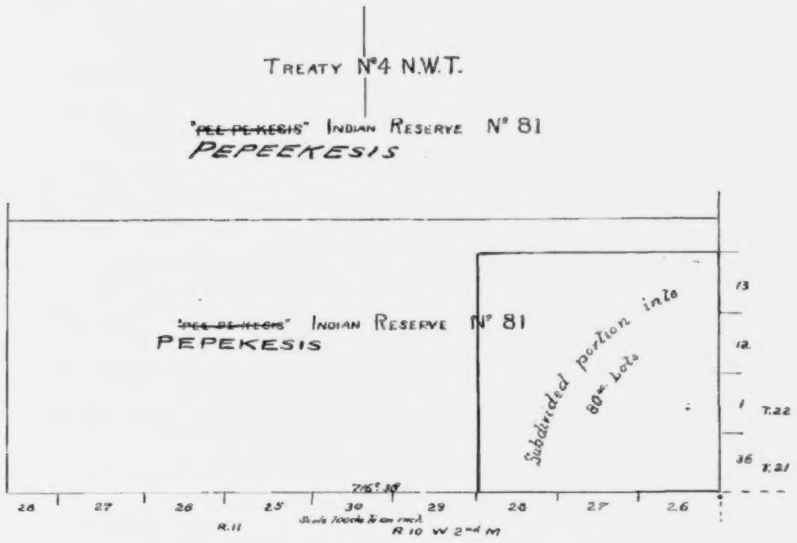
PLAN SHOWING

THE

SUB-DIVISION OF PORTION OF

INDIAN RESERVE No 81

TREATY No 4 N. W. T.


Treaty No 4 N.W.T.
"~~PEE-PE-KEESIS~~" Indian Reserve No 81
PEPEEKESIS
"~~PEE-PE-KEESIS~~" Indian Reserve No 81
PEPEKESIS
Subdivided portion into 80ac. Lots
13
12
1
36
T.22
T.21
716° 30
28
27
26
25
30
29
28
27
26
Scale 100chs to an inch
R.11
R 10 W 2nd M

(Sgd.) J Lestock Reid D.L.S

February 1903

T. 479

W.M.
10-2

Trelenberg Inquiry, to be discussed below, some band members were consulted, either about subdividing the reserve or the whole Scheme, but they rejected Graham's plan:

> [W]hen I first came, I didn't settle, I came down more to investigate. Mr. Graham told me about his scheme on the Reserve, about trying to get a colony for the ex-pupils. He wanted to show the Government that the Indian can be independent and a credit to his Reserve. He told me in order to do this he had to get permission from Ottawa, and before he could start the Colony, he had to get it surveyed. He did tell me that he called a meeting of the Old Men, the Originals, but he was turned down. But, he said there was an Indian Act that he could overrule them for the benefit of the Reserve. At that time, I didn't know anything about the Indian Act.
>
> But, he says, you can have all the land you want, thousands and thousands of acres there, enough for everybody, and no man can take it away from you once you are settled and admitted.
>
> But, he says, I want stickers, people that will stick, and I never let him down."[66]

First Subdivision of IR 81, 1902

By April 1902, the File Hills Scheme was well under way. When asked by the department for the particulars,[67] Graham replied: "[I]t is my intention to have a portion of the South-East of Peepeekesis Reserve sub-divided into 80 acre lots, for the purpose of placing our ex-pupils on their own locations."[68] Indian Commissioner David Laird considered the subdivision survey to be urgent and sought approval from the department by the end of April.[69] By the beginning of June, 12 square miles of the southeast section of Peepeekisis reserve had been subdivided into 96 lots of 80 acres each.[70] Apart from Fred Dieter's account of an earlier meeting with the "Old Men," there is no evidence that Graham consulted with the band members before the survey for the first subdivision.

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[66] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, pp. 164–65 (ICC Exhibit 6A, pp. 172–73, Fred Dieter). In 1907, Graham would describe Dieter as "[t]he first boy who entered the colony, Fred Deiter, is to-day an independent, self-respecting citizen ... the advancement made by this young man has been extraordinary and that any white man might be proud to have made such a record for himself." See W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, Ottawa, May 8, 1907, Canada, ***Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907***, 157 (ICC Exhibit 1, p. 479).

[67] J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, April 2, 1902, NA, RG 10, 7768, file 27111-2 (ICC Exhibit 1, p. 343).

[68] W.M. Graham, Indian Agent, Qu'Appelle Agency, to D. Laird, Indian Commissioner, April 11, 1902, NA, RG 10, vol. 3562, reel C-10099 (ICC Exhibit 1, p. 354).

[69] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, Ottawa, April 23, 1902, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 356–57)

In September 1902, Commissioner Laird wrote to the Secretary of Indian Affairs:

> Referring to the survey into 80 acre lots ... for the purpose of settling graduates of Industrial Schools and other progressive Indians in the Agency on their own farms, I beg to say after consultation with Mr. Agent Graham it was decided to have the survey made on Pee-pe-ke-sis Reserve as the land there was the best for farming purposes, and it was also desirable to have the colony located at a reasonable distance from the Agency, where it would be under the direct supervision of the Agent. To aid in making the scheme a success and be in a position to eventually issue location tickets to the Indians of Okanese, Star Blanket and Little Black Bear's Bands who have joined the colony, it will be necessary to amalgamate the four bands at File Hills ... I have talked the matter over with Mr. Graham and he favours the plan ...[71]

Earlier in 1902, with a view to facilitating the transfer of band members who desired to enter a band that was deemed more "progressive," departmental agents were informed of a change in administrative practice – whereas the consent of both bands had previously been required for transfers, only the receiving band's authorization was now needed.[72] According to J.A. McKenna, some band leaders objected to industrial school graduates who attempted to advance by entering a "band where progress is encouraged."[73] Laird's proposal to amalgamate Peepeekisis and the other File Hills Bands would now eliminate the approval process altogether for members of these three bands who would join, or who had already joined, the Colony on Peepeekisis reserve. After receiving approval from the department,[74] Commissioner Laird authorized Graham to have an agreement presented to the four Bands for their approval and signature;[75] the agreement, however, was never approved despite repeated attempts by Graham. In 1906, Graham later attributed his lack of success to the Star Blanket and Little Black Bear Bands' refusal to consent to the amalgamation.[76]

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[70] J. Lestock Reid, Surveyor, Peepeekisis Indian Reserve, to the Secretary, Department of Indian Affairs, June 6, 1902, NA, RG 10, vol. 3960, file 141977-7 (ICC Exhibit 1, pp. 361–62).

[71] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, September 30, 1902, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 363).

[72] Circular to all Indian Agents and Inspectors in Manitoba and North-West Territories, April 7, 1902, NA, RG 10, vol. 3985, file 173738-1 (ICC Exhibit 1, p. 353).

[73] J.A. McKenna to J.D. McLean, Secretary, February 22, 1902, NA, RG 10, vol. 3985, file 173738-1 (ICC Exhibit 1, p. 331).

Nevertheless, Commissioner Laird was not deterred. In October, he reported:

> Convinced that it is desirable to separate the most promising graduates of the schools from the down-pull of the daily contact with the depressing influence of those whose habits still largely pertain to savage life, the department has authorized an experiment to be made of the colony system The method adopted does not involve the expense of setting apart separate reserves for ex-pupils; but of selecting a portion of some of the larger and more fertile reserves, some distance from the Indian villages or settlements, and under the immediate eye of a farming instructor and almost daily visits of the agent himself. The colony of this kind at File Hills has been fairly successful. To encourage it still more the department last spring had a block of twelve square miles surveyed into eighty-acre lots on Peepeekisis reserve, where the land is all that could be desired for farming purposes. ...
>
> It is hoped that similar colonies will be organized soon on some other reserves.[77]

Formal Transfers of Graduates, 1903–5

In 1903, the department approved the transfer[78] to the Peepeekisis Band of the following 11 industrial school graduates who had settled or were settling in as part of the File Hills Scheme: Fred Dieter, Ben Stonechild, Marius Peekutch, Phillip Jackson, Remi Crow Mocassin, George Little Pine

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[74] Acting DSGIA to David Laird, Indian Commissioner, October 6, 1902, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 364).

[75] David Laird, Indian Commissioner, to W.M. Graham, Indian Agent, Qu'Appelle Agency, April 24, 1903, NA, RG 10, vol. 3562, file 82-7, reel C-10099 (ICC Exhibit 1, p. 378).

[76] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to David Laird, Indian Commissioner, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

[77] David Laird, Indian Commissioner, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[78] Frank Pedley, DSGIA, to David Laird, Indian Commissioner, July 15, 1903, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 392).

(who had been farming in the Colony since at least 1899),[79] John R. Thomas, Joseph McKay, Alex Assinibinis, Stephen Wells, and Isaac Daniels. Of the 11, only six were from other bands within the Qu'Appelle Agency, and only four of those from other File Hills Bands. According to the "Consent of Band to Transfer" forms (also referred to here as Consents to Transfer), which were all dated June 12, 1903,[80] three Peepeekisis band members approved the transfers: Tommy Fisher, who had transferred into the Band in 1891 from Gordon's Band after his marriage to a band member;[81] Buffalo Bow, who had transferred into the Band in 1887 from Okanese;[82] and Yellow Bird, whose name first appeared in the 1883 paylist.[83] All three signed their marks beside the designation "Councillor."

It is significant to note that, throughout this time period, the Peepeekisis Band continued to be without a recognized Chief or Council.[84] As Fred Dieter remarked during the 1954 Trelenberg Inquiry, "if there was any business to be carried on or any names to be signed, they always called up the old original members."[85] Dieter stated that 10 or 11 "old people" were present at a meeting to discuss his admission to the Peepeekisis Band and listed nine of the members by name.[86] According to the 1903 treaty annuity paylist, dated a few weeks after the meeting, there were 18 male members of the Band receiving annuities on their own ticket, who could be considered possible voters.[87] Dieter also noted that Buffalo Bow had told Graham "that there was no need of voting us in because they had us in anyway and we were automatically put on the Peepeekisis list."[88] Dieter referred to "us" because he claimed that he, Ben Stonechild,[89] and Francis Dumont were admitted at the same time. Francis Dumont also stated that he was admitted into the Band with Dieter and Stonechild in 1903;[90] however, Dumont's Consent to Transfer form, which both Dieter and Stonechild witnessed, was dated June 17, 1905.[91] It is clear in both Dieter's and Dumont's testimonies before the Trelenberg Inquiry that they thought only three people were considered at the 1903 meeting and not the other colonists whose transfer forms were also dated June 12, 1903.

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[79] David Laird, Indian Commissioner, to SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[80] J.A.J. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, July 7, 1903, enclosing 11 Consent of Band to Transfer forms dated June 12, 1903, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 380–91). A number of the Consent forms were dated July 29, 1902, which was crossed out and the date of June 12, 1903, added.

[81] Treaty annuity paylist, Peepeekisis Band, 1891, NA, RG 10, vol. 9424 (ICC Exhibit 3E, p. 11). In 1891, he is referred to only as Tommy; later, in 1901, he is referred to as Tommy Fisher. See NA, RG 10, vol. 9434 (ICC Exhibit 3E, p. 96).

[82] Treaty annuity paylist, Peepeekisis Band, 1887, NA, RG 10, vol. 9420 (ICC Exhibit 3E, p. 6K). Buffalo Bow's Cree name is Kamoostooswahchapao, which appears in the1887 paylist, NA, RG 10, vol. 9416 (ICC Exhibit 3E, p. 6C), and is changed in the 1891 paylist to his English name, NA, RG 10, vol. 9424 (ICC Exhibit 3E, p. 10).

[83] Treaty annuity paylist, Peepeekisis Band, 1883, NA, RG 10, vol. 9416 (ICC Exhibit 3E, p. 6C). Yellow Bird's Cree name first appears as Sa-scoop-pee-a-sis in 1883. In 1884, Sa-scoop-pee-a-sis' band number changes, NA, RG 10, vol. 9417 (ICC Exhibit 3E, p. 6D), and, in 1890, his English name is identified as Yellow Bird, NA, RG 10, vol. 9423 (ICC Exhibit 3E, p. 7).

[84] Violet Kayseass, Registration, Revenues and Band Governance, DIAND, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7).

[85] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, p. 295 (ICC Exhibit 6A, p. 305, Fred Dieter).

Community session evidence called into question Graham's method of obtaining Consents to Transfer. Jessie Dieter commented on Graham's method of obtaining the Consents when she stated, "No, they didn't sign anything. He [Graham] just went ahead and brought them in. ... They wouldn't sign them, that's what they told him."[92] Wes Pinay also claimed that these men did not sign the forms:

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[86] Trelenberg Inquiry, Transcript of Proceedings, May 25-28, 1954, pp. 141-42 (ICC Exhibit 6A, pp. 149-50, Fred Dieter). Dieter listed Pinowsy Moostos (Crooked Nose), Chief Hawk, Yellowbird, Playful Child, Shave Tail, Buffalo Bow, Night and Day Child, Keewisk, and Tommy Fisher as all attending the meeting.

[87] Treaty annuity paylist, Peepeekisis Band, 1903, NA, RG 10, vol. 9436 (ICC Exhibit 3E, pp. 114, 117, 120, 123, 126, and 129).

[88] Trelenberg Inquiry, Transcript of Proceedings, May 25-28, 1954, p. 144 (ICC Exhibit 6A, p. 152, Fred Dieter).

[89] Attachment to J.A. McKenna to the Secretary, Department of Indian Affairs, July 7, 1903 (ICC Exhibit 1, p. 382). The Consent to Transfer form uses the name Ben Asinee-awasis; however, the 1903 annuity paylist uses the name Ben Stonechild. Under both names, it is stated that he transferred from #46 Okanese Band.

[90] Trelenberg Inquiry, Transcript of Proceedings, May 25-28, 1954, p. 201 (ICC Exhibit 6A, p. 209, Francis Dumont).

[91] Peepeekisis Band, Consent of Band to Transfer, June 17, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, p. 430).

[92] ICC Transcript, September 11-12, 2002 (ICC Exhibit 5A, p. 120, Jessie Dieter).

> These three old timers I'll call them, and this is the history that was given to me, that Graham had approached them that – about bringing in some ex-students to the Peepeekisis land, that he wanted to get them established ... but they weren't told – weren't given the proper information ... the interpreter told them that if they allowed Graham to do this, that their families and all I guess whatever they called the original band members, Graham will supply them with new homes, which were supposed to be made of lumber, which never happened.[93]

In addition, Albert Miles, a farming instructor on the reserve from 1901 to 1912, confirmed at the 1954 Trelenberg Inquiry that it was his signature as a witness that was on the above-mentioned Consent forms. However, he also affirmed that he "never was asked by anybody in authority – I say, from the Agency, to call a meeting of the Band to admit further members"; as well, he affirmed that, in his entire period of employment, he was only present for one band meeting – in 1911 – during which the admission of further members was discussed.[94] Miles added: "[T]hem boys were sent out to me ... by Mr. Graham, to start on farms, and how they got there, or what their status was, I wasn't concerned at all."[95] Yet Fred Dieter, who had been present in the Colony during this period, said earlier during the same inquiry that the general practice for notifying all band members of meetings was "[b]y the Farm Instructors going around and letting people know."[96] In fact, he specifically mentioned A.H. Miles. Joe Ironquil testified that notice of meetings was given in the following manner: posters were put up in the agency office in addition to the farming instructors going around carrying the "word of these meetings throughout the Reserve," and whoever was interested came to the meeting.[97] Henry McLeod, however, noted that "the original way, the Farm Instructor was given the job to go around among the farmers ... and carry the message of the meeting."[98]

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[93] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 196, Wes Pinay.)

[94] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 271 (ICC Exhibit 6A, p. 281, Albert Miles).

[95] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 273 (ICC Exhibit 6A, p. 283, Albert Miles).

[96] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, pp. 166–67 (ICC Exhibit 6A, pp. 174–75, Fred Dieter).

In February 1904, R.L. Ashdown replaced Graham as the Indian Agent for the Qu'Appelle Agency. Although he was promoted Inspector of Indian Agencies for the Qu'Appelle Inspectorate, Graham would remain involved in the management of the File Hills Scheme.[99] In his August 1904 report on the Qu'Appelle Agency, Ashdown indicated that, within the "File Hills Ex-Pupil Colony," there were "seven ex-pupils located in the colony, all of whom are doing well," and, in particular, Fred Dieter, John R. Thomas, and Ben Stonechild were all married with comfortable homes and growing farms.[100]

The most recent arrival to the Colony, Roy Keewatin, was not mentioned in Ashdown's report. He was admitted in 1904 by means of a Consent form signed by Yellow Bird, Keewist, Tommy Fisher, and Joseph McNabb and endorsed by Indian Agent Ashdown.[101] However, in 1954, Roy Keewatin testified before the Trelenberg Inquiry that he did not attend any meeting where he was voted into the Band. All that he knew, in fact, he had learned from asking some of the older *original* band members:

> I happened to be at a little gathering, and they were discussing about their Reserve. They didn't seem to be pleased, just as they were talking, as if their Reserve was

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[97] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 179–80 (ICC Exhibit 6A, pp. 187–88, Joseph Ironquil).

[98] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, pp. 237, 270–73, 280 (ICC Exhibit 6A, p. 245, Henry McLeod; pp. 280–83, 290, Albert Miles).

[99] Marian Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996 (ICC Exhibit 9A, p. 82). The Qu'Appelle Inspectorate was later reorganized into the South Saskatchewan Inspectorate.

[100] R.L. Ashdown, Indian Agent, Qu'Appelle Agency, to the SGIA, August 25, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 172–77 (ICC Exhibit 1, pp. 410–11).

[101] Peepeekisis Band, Consent of Band to Transfer, June 18, 1904, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, p. 405).

> taken from them; and I asked one of them if he knew how I got in, and he said through Buffalo Bow and Mr. Graham.[102]

According to Keewatin, Buffalo Bow "called himself the Head Man at that time."[103] Fred Dieter also stated that Buffalo Bow acted as headman at one point, but it was quite a while after the first transferees were admitted.[104]

The absence of an elected Chief or councillors recognized by both the department and the Peepeekisis Band during the initial stages of the Colony Scheme allowed Graham more latitude in his dealings with the band and the ex-pupils. Don Koochicum was critical of Graham's treatment of some ex-pupils in his oral testimony: "[A] lot of these people here that were put here were forced onto this reserve against their will, and they were afraid also."[105] They were sent to the colony and, in some cases, their marriages were arranged for them. According to Elizabeth McKay, her brother "didn't belong into this colony. He wasn't from – they just got him married and then they put him there."[106] Daniel Nokusis recounted a story told to his father by Clifford Pinay: "I [Clifford Pinay] was only 15 or 16 years old. I was finished school. I thought I was going to go back to Sakimay he says, but he [Graham] sent me – even before I stepped out he told me I got a woman for you to go and start farming in Peepeekisis."[107] Pinay, nevertheless, apparently made the most the situation; he fell in love with his wife, started a farm, and never left the Colony. Clifford Pinay also related to his grandson, Wes Pinay, how he was pressured by Graham to stay in the Colony: "I mean I didn't want to come when Graham told me at Lebret that we're going to take you to Peepeekisis. We're going to teach you how to farm. He [Clifford Pinay] told him I'd like to go back to my reserve. He

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[102] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 219 (ICC Exhibit 6A, p. 227, Roy Keewatin).

[103] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 219 (ICC Exhibit 6A, p. 227, Roy Keewatin).

[104] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, p. 296 (ICC Exhibit 6A, p. 306, Fred Dieter).

[105] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 261, Don Koochicum).

[106] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 131–32, Elizabeth McKay).

[107] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 303, Daniel Nokusis).

[Graham] says no, you're not, you're coming up here."[108] Eleanor Brass, daughter of Fred Dieter, provided a possible explanation for Graham's actions in her autobiography: "So keen was the desire for the success of this Scheme that Mr. Graham made his own plans which were felt to be quite strict at times. A few beginners could not stand up to these rules and soon left for other parts."[109] According to Aubrey Goforth, some men resisted Graham's pressures: "I know of men that have gone home from here, that ran and hid and weren't found, but they were afraid to be found, and that's what I heard from my father and the late Walter Gordon from Pasqua."[110] This may have been the case of Stephen Wells who, according to his Consent to Transfer form, was admitted to the Band in 1903.[111] In subsequent years, Wells is described as "absent" in 1904, "at Crooked Lakes" in 1905 and 1906, "away" in 1907, and "in the US" in 1909.[112] In 1920, the paylist comment described Wells as married and living in the United States, and his name is struck in subsequent years.[113]

Some colonists, however, appear to have expressed great interest in coming to the Colony. In April1905, Frank Natawaywinis, a student at Regina Industrial School and a member of the Swan Lake Band, asked the department for permission to settle in the Colony since he had previously visited it and thought it would give him a better chance of establishing himself.[114] Initially, Commissioner Laird refused to grant Natawaywinis' request because the assistance was already allocated for him on Swan Lake Reserve.[115] However, the Reverend R.P. MacKay of the Presbyterian Church wrote to Deputy Superintendent General Frank Pedley, requesting that Frank be allowed to join the Colony.[116] Pedley was then advised as follows by Martin Benson, an official with the department:

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[108] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 218, 225, Wes Pinay). See also Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, pp. 97, 218 (ICC Exhibit 6A, p. 101, Charlie Koochicum; p. 226, Roy Keewatin).

[109] Eleanor Brass, *I Walk in Two Worlds* (Calgary: Glenbow Museum, 1987), 1 (ICC Exhibit 10B, p. 10).

[110] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 366, Aubrey Goforth).

[111] Peepeekisis Band, Consent of Band to Transfer, June 12, 1903, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, p. 390).

[112] See treaty annuity paylists, Peepeekisis Band, 1904, NA, RG 10, vol. 9437 (ICC Exhibit 3E, p. 146); 1905, NA, RG 10, vol. 9438 (ICC Exhibit 3E, p. 160); 1906, NA, RG 10, vol. 9439 (ICC Exhibit 3E, p. 172); 1907, NA, RG 10, vol. 9440 (ICC Exhibit 3E, p. 184); 1909, NA, RG 10, vol. 9463 (ICC Exhibit 3E, p. 211).

[113] Treaty annuity paylist, Peepeekisis Band, 1920, NA, RG 10, vol. 9442 (ICC Exhibit 3E, p. 436).

[114] R.P. MacKay, Foreign Mission Committee, Presbyterian Church in Canada, to Frank Pedley, April 27, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 416–17). No copy of Natawaywinis' request has been found; however, details of this request were written in the letter quoted here.

> It was apparently intended that this colony should embrace only Indians belonging to the File Hills Agency, but as Dr Mackay says that Mr Inspector Graham is quite willing to receive other good boys if the Commissioner will give his consent. I would recommend that if possible this boy Frank be granted the privilege of settling there, as it is stated that he will have no opportunity of benefiting by the advantages he has received at the school if he returns to the reserve and in all likelihood he would retrograde.
>
> I think that when ex-pupils, even if belonging to other reserves, are anxious and willing to settle in the colony, every facility should be offered to them to do so, and that if necessary, the colony should be enlarged to take in such pupils.[117]

These recommendations were approved, and Commissioner Laird was informed of this decision by letter from J.D. McLean. In a marginal note on this letter to Laird, McLean stated, "I take it that the Commr should ask the File Hills Band to receive this young man into their number if he is to participate in all the privileges of the band."[118] By the end of June, a Consent to Transfer form was signed and sent to the department,[119] and formal consent approving the transfer was given shortly thereafter.[120]

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[115] David Laird, Indian Commissioner, to Frank Natawahwaywenis, April 18, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 415).

[116] R.P. MacKay, Foreign Mission Committee, Presbyterian Church in Canada, to Frank Pedley, April 27, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 416–17).

[117] Martin Benson, Department of Indian Affairs, to DSGIA, May 1, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 418).

[118] J.D. McLean, Secretary, to David Laird, Indian Commissioner, May 18, 1905, NA, RG 10, vol.7768, file 27111-2 (ICC Exhibit 1, p. 423).

[119] D. Laird, Indian Commissioner, to the Secretary, June 29, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 429, 433).

[120] The Secretary to D. Laird, Indian Commissioner, July 4, 1905 NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 434).

On June 17, 1905, the same date as Natawaywinis' transfer form was signed, five additional transfer forms – for John Bellegarde, George Keewatin, Francis Dumont, Mark Ward, and Herbert Oliver Mentuck – were signed but were not forwarded to Ottawa until July 21, 1906.[121] Earlier, in May1905, Graham had written to the department's Secretary, requesting that John Bellegarde and George Keewatin be admitted into the Band, but no transfer forms were included.[122] In a marginal notation on this letter, a request was made to Inspector Graham to seek the consent of the Band for these admissions.[123] When these Consent to Transfer forms were sent, Commissioner Laird explained that some of the transferees (Bellegarde, Keewatin, Dumont, and Ward) had been "farming in the Colony for some time; but transfers for their final admission of the Colony were not asked for until Mr. Inspector Graham was satisfied that they would prove themselves to be good workers."[124] According to his statement at the Trelenberg Inquiry, Francis Dumont testified that he started to farm at Peepeekisis in 1901 after graduating from the school at Lebret.[125] In contrast, Mentuck only arrived in the spring of 1904 but was included by Laird since he had "been working steadily since he settled there."[126] The Secretary informed Laird of the department's approval of these transfers on July 28, 1905.[127]

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[121] D. Laird, Indian Commissioner, to the Secretary, July 21, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 435). See also Peepeekisis Band, Consent of Band to Transfer forms, June 17, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 427–28, 430–32).

[122] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to the Secretary, Department of Indian Affairs, May 22, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 425–26)

[123] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to the Secretary, Department of Indian Affairs, May 22, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 425–26).

[124] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, Ottawa, July 21, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 435).

[125] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 205 (ICC Exhibit 6A, p. 213, Francis Dumont).

[126] David Laird, Indian Commissioner, Winnipeg, to the Secretary, Department of Indian Affairs, Ottawa, July 21, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 435).

[127] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, NA, RG 10, vol. 7111, file 675/3-3-10, vol. 1 (ICC Exhibit 1, p. 436).

With the exception of Joseph Desnomie, the six Consent forms signed in June 1905 were attested to by earlier transferees under the Colony Scheme: Fred Dieter, J.R. Thomas, Joseph McKay, Ben Stonechild, Roy Keewatin, and Peter Swan.[128] Roy Keewatin, however, testified at the 1954 Trelenberg Inquiry that he had never, at any time, attended any meeting with regard to the admission of other members, nor had he ever been invited to or notified of such a meeting.[129] Two years later, while testifying at the 1956 McFadden hearing, Roy Keewatin attempted to clarify his previous testimony at the Trelenberg Inquiry by stating that he had never attended a meeting of the *original* band members; however, he did attend one meeting that related only to the admission of his brother George and Herbert Oliver Mentuck.[130] Keewatin also stated that there were some other meetings; however, he stated, "I may have had my name in them but not to my knowledge."[131] Keewatin acknowledged his signatures on all the 1905 Consent forms.[132]

In his annual reports, Inspector Graham lauded the ex-pupils for their progress: "The Indians of this colony live exactly as white people do, they speak the English language entirely and a person driving through this colony would think he was in a thrifty white community."[133] Commissioner Laird also had nothing but praise for the Colony: "The File Hills colony for graduates shows the benefits of industrial school training."[134] In 1906, William Gordon, the newly appointed Indian Agent for the Qu'Appelle Agency, commented that the colonists were "in a better position than most white settlers who began five years previously."[135]

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[128] Peepeekisis Band, Consent of Band to Transfer forms, June 17, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 427–28, 430–32) and NA, RG 10, vol. 7768, file 27111-2, June 17, 1905 (ICC Exhibit 1, p. 429).

[129] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 220 (ICC Exhibit 6A, p. 228, Roy Keewatin).

[130] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 132–33, Roy Keewatin).

[131] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 132, Roy Keewatin).

[132] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 134–36, Roy Keewatin).

[133] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to Frank Pedley, DSGIA, October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 184–85 (ICC Exhibit 1, pp. 446–47).

[134] David Laird, Indian Commissioner, to Frank Pedley, DSGIA, October 14, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 194 (ICC Exhibit 1, p. 455).

Second Subdivision of IR 81, 1906–9

In March 1906, Inspector Graham requested that an additional tract of land within the Peepeekisis reserve be laid out in farming plots, since – in his words – "all the good farming plots in the File Hills Colony are about taken up" (there were 96 lots, each of 80 acres, from the first subdivision).[136] In response, J.D. McLean informed Commissioner Laird that the department considered it "advisable that all the action in connection with the amalgamation of the four bands Peepeekisis, Okanese, Star Blanket, and Little Black Bear should be completed before any further surveys are made," and he instructed Laird to act accordingly.[137] Four years later, Graham would report that the four File Hills reserves were "practically worked as one band" and that, because the three most northerly reserves contained little land suitable for farming, "those Indians who desire to farm go to the south end of Peepeekisis reserve where the land is more open."[138] Nevertheless, in March 1906, Graham could inform Laird only that he had repeatedly attempted to obtain the permission of the bands to amalgamate; however, both the Star Blanket and Little Black Bear Bands refused to approve the idea.[139] Graham also stated that he was having problems keeping the colonists from plowing fields outside the limits of the Colony, and he claimed that "when the time comes to extend the Survey

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[135] W.M. Gordon, Indian Agent, Qu'Appelle Agency, to Frank Pedley, DSGIA, July 23, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 145 (ICC Exhibit 1, p. 473).

[136] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to the Secretary, Department of Indian Affairs, March 9, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 456).

[137] J.D. McLean, Secretary, to David Laird, Indian Commissioner, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 458).

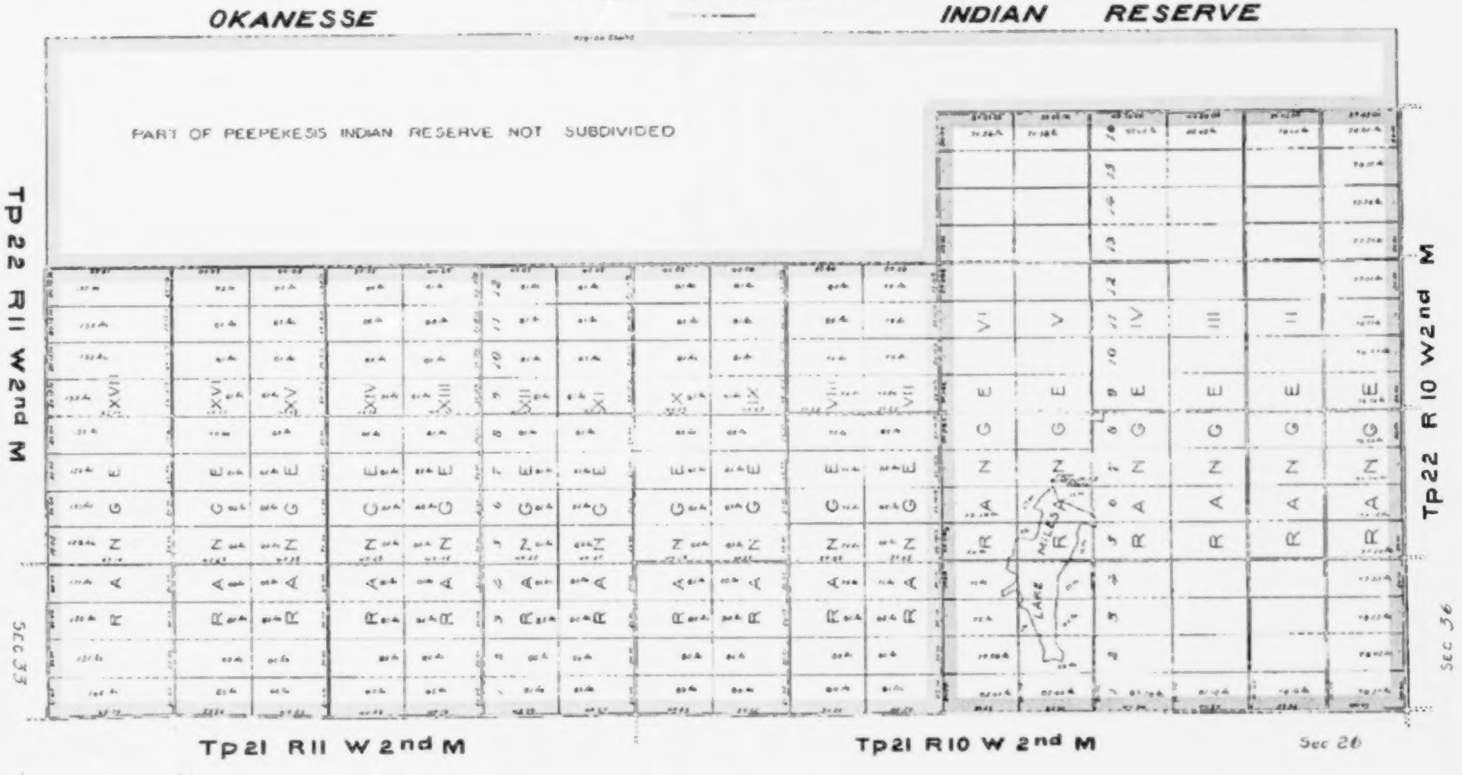
[138] W.M. Graham, Inspector of Indian Agencies, File Hills Agency, to Frank Pedley, DSGIA, April 18, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1910*, 133 (ICC Exhibit 1, p. 498).

[139] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate to David Laird, Indian Commissioner, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

PLAN
OF SUB-DIVISION OF PART OF
PEEPEKESIS I.R. Nº 81
INTO 80 ACRE LOTS

Surveyed by J. L. Reid D.L.S 1903
and
J. K. McLean D.L.S 1906

Scale 30 Chains to 1 Inch


OKANESSE INDIAN RESERVE
PART OF PEEPEKESIS INDIAN RESERVE NOT SUBDIVIDED
Tp 22 R 11 W 2nd M
Tp 22 R 10 W 2nd M
Tp 21 R 11 W 2nd M
Tp 21 R 10 W 2nd M
Sec 33
Sec 36
Sec 26
RANGE I
RANGE II
RANGE III
RANGE IV
RANGE V
RANGE VI
RANGE VII
RANGE VIII
RANGE IX
RANGE X
RANGE XI
RANGE XII
RANGE XIII
RANGE XIV
RANGE XV
RANGE XVI
RANGE XVII
LAKE

S. Bray
Chief Surveyor
Dept of Indian Affairs

Frank Pedley
Deputy Superintendent General
of Indian Affairs

T. 700
25.6.29½

T. 700

these fields would be cut up and compensation will have to be given."[140] Graham continued to ask for an additional survey because he couldn't justify "men remaining in the Colony and farming inferior lands when there is better just outside the Colony that they have an equal right to."[141]

Graham's persistence paid off. Laird supported his recommendation, noting: "Even Indians of that band [Peepeekisis] who are not ex-pupils of any School would be placed in a better position by being located on surveyed lots."[142] J.D. McLean soon approved the new subdivision, based on Laird's view that "there is no immediate prospect of an amalgamation of the five File Hills bands."[143] McLean added: "[T]his being the case the students, or others to be located on the allotment laid out in the Peepekesis [sic] Indian reserve should be confined to members of this band or to those who have been formerly admitted as members of the band."[144] Previously, allotments had not been limited to those who had been "formerly admitted." Within months, 120 lots of approximately 80 acres each and 12 lots of approximately 130 acres each were surveyed, leaving less than 8,000 acres of the 26,624 acre reserve not subdivided.[145]

As with the first subdivision, departmental records do not indicate any consultation with the Band; according to oral testimony, however, there was again opposition. Don Koochicum explained:

> [W]hen my grandfather heard that they were going to subdivide this reserve, he was against subdivision, but they did it anyway. So what good was his voice? They did it anyway. And on the map there was 7,600 acres that was left over there that was not

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[140] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to David Laird, Indian Commissioner, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

[141] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, Balcarres, SK, to David Laird, Indian Commissioner, Winnipeg, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

[142] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, April 4, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 460).

[143] J.D. McLean, Secretary, to W.M. Graham, Inspector of Indian Agencies, May 8, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 465).

[144] J.D. McLean, Secretary, Ottawa, to W.M. Graham, Inspector of Indian Agencies, Balcarres, SK, May 8, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 465).

[145] See Exhibit 7D, "Plan of Sub-Division of Part of the Peepekesis I.R. No. 81 into 80-Acre Lots," surveyed by J.L. Reid, 1903, and J.K. McLean, 1906 (DIAND, Land Registry, Microplan 1162).

> subdivided, and it said original band land, you know. ... they eventually subdivided that too.[146]

His brother Stewart added that his elders never spoke of a meeting to discuss the subdivision and that others opposed the subdivision, even colonists: "[S]ome of the people even from down the colony here, if they oppose, well, then they go to jail too. There was the same situation as we were. It was going to happen anyway. Graham says he's – when Graham said this, well that's what it had to be. Be no other way."[147]

Sarah Carter noted in her article concerning the File Hills Colony that "[a]fter the second subdivision survey for the colony in 1906 the original band members were left with less than one-quarter of their reserve, and the portion left to them was the least suitable to agriculture."[148]

W.M. Graham, seen here with his wife c. 1910, was the organizing force behind the File Hills Colony. *Glenbow-Alberta Archives, NA-3454-37*

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[146] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 258–59, Don Koochicum).

[147] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 261, Stewart Koochicum).

[148] Sarah Carter, "Demonstrating Success: The File Hills Farm Colony" (fall 1991) 16, no. 2 *Prairie Forum* 164 (ICC Exhibit 10A, p. 8).

Formal Transfers of Graduates, 1906–11

On August 2,1906, a request was made by Indian Commissioner Laird to the department for Joseph Ironquil and Clifford Pinay to be admitted into the Peepeekisis Band.[149] Ironquil and Pinay were not former members of a File Hills or Qu'Appelle Agency Band; instead they had transferred in from Gordon's Band and Sakimay, respectively. Consent forms certifying a favourable vote by a majority of the Band's electors (there were 29 potential electors[150] in July 1906) were each signed by three *original* members and five or six transferees.[151] The department approved these transfers in August.[152] Ernest Goforth alleged in 1954 that Ironquil had told him that no meeting was held to admit him into the Band;[153] however, this statement is contradicted by the testimony given by Fred Dieter[154] and by Joseph Ironquil himself. Ironquil, in fact, named several *original* members who he claimed were present at the meeting.[155]

On June 11, 1908, Consent to Transfer forms were signed for six new members: James Linklater Moore, a non-Indian named Alfred Swanson, Alexander Brass, Elijah Dickson, Henry McLeod, and Robert Akapew.[156] Less than a year later, on April 20, 1909, four additional Consent

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[149] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 2, 1906, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 474).

[150] Twenty-nine males were located on the paylist for July 1906. Another male was absent in Manitoba at the time of treaty payment. It is interesting to note that both Ironquil and Pinay's names appear on that year's paylist; however, Pinay's name is crossed out with Ironquil being the only one paid. See treaty annuity paylist, Peepeekisis Band, July 12, 1906, NA, RG 10, vol. 9439 (ICC Exhibit 3E, pp. 164, 168, 172).

[151] Peepeekisis Band, two Consent of Band to Transfer forms, July 1906, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 467–68).

[152] J.D. McLean to Laird, August 9, 1906, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 475).

[153] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 36–37 (ICC Exhibit 6A, pp. 40–41, Ernest Goforth).

[154] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 147–48 (ICC Exhibit 6A, pp. 155–56, Fred Dieter).

[155] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 176–78 (ICC Exhibit 6A, pp. 184-86, Joseph Ironquil).

[156] Peepeekisis Band, copies of Consent of Band to Transfer forms, June 11, 1908, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 483–88).

Women of the File Hills Colony, 1907.
Glenbow-Alberta Archives, NA-3454-33.

to Transfer forms were signed for Magloire Bellegarde, Adam Blackfoot, Jean Baptiste Dumont, and Frank Akapew.[157] Five of these transferees were from other File Hills Bands. Again, Consent forms certifying a favourable vote by the majority of band electors (there were 31 potential voters who were paid treaty annuities in July 1908[158] and 36 potential voters who were paid treaty annuities in July1909[159]) were each signed by between seven and 13 band members.[160] Although there is no primary documentation within the record, departmental correspondence relating the request for transfer and the approval of the department to these transfers was produced before the McFadden Commission in 1956.[161]

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[157] Peepeekisis Band, Consent of Band to Transfer forms, April 20, 1909, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 491–94).

[158] Treaty annuity paylist, Peepeekisis Band, July 13, 1908, NA, RG 10, vol. 9441 (ICC Exhibit 3E, pp. 187, 190, 193, 196). Thirty-seven males, including the six newly transferred, were paid annuities in 1908. Ernest Goforth is paid on his own ticket; however, it is observed that his annuities were funded to the Qu'Appelle Industrial School.

[159] Treaty annuity paylist, Peepeekisis Band, July 12, 1909, NA, RG 10, vol. 9442 (ICC Exhibit 3E, pp. 200, 204, 208, 211, 214). Thirty-nine males including the three newly transferred were paid annuities in 1909. Although Ernest Goforth (who is included in the 39 males) received his annuities for 1909, the notation beside his name suggests he either was being funded at a school in the United States or was away in the United States.

[160] See Peepeekisis Band, copies of Consent of Band to Transfer forms, June 11, 1908, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 483–88); April 20, 1909, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 491–94). Note that Graham endorsed these forms as "Inspector of Indian Agencies"; however, when some of the copies were made (in the case of the forms dated 1908), "Indian Agent" was not crossed out and replaced by "Inspector of Indian Agencies."

Although no *original* members signed the Consent forms, according to one of the new transferees, some of them were present at the vote. During the 1954 Trelenberg Inquiry, Henry McLeod testified that he originally came to Peepeekisis in 1906 where he worked for one of the "boys" for two years until he asked Graham in 1908 to be allowed a "start" in the Colony.[162] Graham initially refused McLeod's request because of his disability, since he had only one arm; however, Graham reconsidered and offered him a "chance."[163] McLeod recalled that Graham instructed him to obtain Day Walker's farming outfit since he was "one of the old people quitting farming that spring" and to obtain an ox from the Pasqua reserve.[164] McLeod then explained that a meeting was held – news having been sent to the "farmers" – where he was voted in; it was attended by colonists and at least four of the *original* members,[165] although later in his testimony McLeod stated that the *original* members did not vote at the 1908 meeting but merely attended it.[166] In contrast, while testifying before the Trelenberg Inquiry, Ernest Goforth recalled that another band member had spoken to him concerning Magloire Bellegarde's admission meeting in 1909, at which time, that band member allegedly told Ernest Goforth, none of the *original* members were even present.

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[161] Decision of Judge J.H. McFadden, "In the Matter of the Indian Act Chapter 149 R.S.C 1952 and Amendments thereto and in the matter of the membership of Alex Desnomie and other parties in the Peepeekeesis Band," December 13, 1956 (ICC Exhibit 6C, pp. 21–22). At this hearing McFadden states that two letters were entered into the record: a letter dated June 29, 1908, from Laird to the department asked for the transfer and a letter dated July 6, 1908, from the department approved the transfer.

[162] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 235 (ICC Exhibit 6A, p. 243, Henry McLeod).

[163] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 235 (ICC Exhibit 6A, p. 243, Henry McLeod).

[164] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 235 (ICC Exhibit 6A, p. 243, Henry McLeod).

[165] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 236 (ICC Exhibit 6A, p. 244, Henry McLeod).

[166] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 235–39 (ICC Exhibit 6A, pp. 243–47, Henry McLeod).

Goforth elaborated: "He also said when the votes were counted, or shown by the holding of hands ... Philippe Johnson wouldn't – didn't hold up his hand. Mr. Graham, who was present, asked Philippe: 'What about you Philippe?' and Philippe's hand went up like that."[167] According to the testimony of Don Koochicum at the ICC community session, Magloire Bellegarde asked Koochicum's grandfather, an *original* band member, for his permission to live on the reserve, and to Koochicum's knowledge was the only colonist to have done so.[168]

The 1911 "Fifty Pupil Agreement"

The treaty annuity paylists show that by 1906 the male industrial school graduates brought into Peepeekisis for the File Hills Scheme began to outnumber the *original* male band members.[169] By 1908, 37 men were listed as having received treaty annuity payments, 22 of whom were industrial school graduates brought in as part of the File Hills Scheme.

By 1910, opposition arose from the colonists themselves to the admittance of more members into the Colony.[170] The subdivided portion of the reserve consisted of almost 19,000 acres (approximately 230 lots),[171] about half of which was, according to Graham in 1907, either already under cultivation or being brought under cultivation by colonists.[172] Graham did not specify how much of this cultivation, if any, had been undertaken by *original* members who were not part of the

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[167] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 51 (ICC Exhibit 6A, p. 55, Ernest Goforth).

[168] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 277, Don Koochicum).

[169] Treaty annuity paylist, Peepeekisis Band, July 13, 1908, NA, RG 10, vol. 9441 (ICC Exhibit 3E, pp. 187, 190, 193, 196).

[170] W.M. Graham, Inspector of Indian Agencies, to the Secretary, Department of Indian Affairs, October 18, 1910, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 502).

[171] W.M. Graham, Inspector of Indian Agencies, to the Secretary, Department of Indian Affairs, October 18, 1910, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 502).

[172] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 156–59 (ICC Exhibit 1, pp. 478–81).

Colony; however, he did state that nearly every member of the colony was "occupying from 160 to 240 acres" of land.[173]

In a letter dated October 18, 1910, Graham explained the situation to the department's Secretary and suggested a plan of action:

> Up to the present time admission to this Colony has been made through a vote of Peepeekesis Band, which of course includes all the male voting Indians of the reserve. At the beginning there was not much difficulty in getting the applicants admitted, but of late there has been quite a lot of opposition, and as these Indians, particularly those of the Colony, are seeing the results of their farm work, they are naturally less inclined to admit others, in whom they have no personal interest.
>
> As the question of settling this tract of land with graduates is very important, some definite plan will have to be worked out, and an understanding arrived at with the present Indians resident on the reserve.
>
> My idea is, that the balance of Peepeekesis reserve, some seven thousand acres be surveyed, which will give a block of about twenty-six thousand acres, and that a cash payment of say $20.00 each, be made to the one hundred and fifty resident Indians of the reserve, on the understanding that the Department will have the right, without reference to the Band, to admit, say sixty, male graduates. If this number is decided upon it would leave ample land for all and a good surplus for the natural increase. If an arrangement of this kind could be brought about, it would take about three thousand dollars, and my idea is, that if this amount could be advanced by the Department, it could all be returned by assessing each Indian admitted $50.00. If the Department approve of my suggestion, I should be glad if a form of agreement could be drawn up, so that I could submit it to the Indians.[174]

Two days later, Graham wrote again, stating that he had visited the land in question and noticed that there was "more rough country and water than I thought" and suggested the number of admissions be lowered to 50 and the entrance payment raised to $60.00 each.[175]

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[173] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 156–59 (ICC Exhibit 1, pp. 478–81).

[174] W.M. Graham, Inspector of Indian Agencies, to the Secretary, Department of Indian Affairs, October 18, 1910, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 502–4).

[175] W.M. Graham, Inspector of Indian Agencies, to the Secretary, Department of Indian Affairs, October 20, 1910, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 505).

By the end of June 1911, the department had developed a new Memorandum of Agreement, later commonly referred to as the "Fifty Pupil Agreement," in which the Peepeekeesis Band would allow the entry of new colonists upon the following conditions:

> WHEREAS it is deemed expedient by the Superintendent General that the graduates of the various Indian boarding and industrial schools should be located together on farm lands;
>
> WHEREAS the Band has from time to time admitted graduates from the various Indian boarding and industrial schools to their membership, with all the privileges of their Band, which is now known as the File Hills Colony;
>
> WHEREAS the Superintendent General desires to secure the right to locate future graduates in the said colony and has requested the said Band to admit such graduates to their membership;
>
> WHEREAS the Band, for the consideration and subject to the conditions hereinafter set forth have agreed to admit to their membership other such graduates:
>
> Now, therefore, this memorandum witnesseth that, in consideration of the sum of Twenty Dollars ($20.00) now paid to each and every member of the Band in good standing by the Superintendent General, the Band convenants, promises and agrees as follows:
>
> 1: To admit into the membership of the Band such male graduates of the various Indian boarding and industrial schools as shall from time to time be designated by the Superintendent General, and, whenever such graduate if so designated, he shall thereby become a member of the Band, but such male graduates shall not exceed fifty in number;
>
> PROVIDED, that, in the event of the death of any such graduate unmarried, the Superintendent General may designate another graduate in his place.
>
> 2: That the Superintendent General may locate such graduates on whatever quantity of land, and in whatever portion of the Band's reserve, he may deem advisable, but so as not to interfere with any of the present locations of the various members.
>
> 3: That such graduates so designated, and their families, shall share in all the rights and privileges of the Band in every respect and as fully as the original members, thereof."[176]

It is interesting to note that the draft agreement stated that the Peepeekisis Band is "now known as the File Hills Colony." On June 27, 1911, J.D. McLean wrote to Graham attaching the above-mentioned agreement and a cheque for $2,960 and asking him to "present and explain fully to the members of Peepeekeesis Band" the proposal.[177] On Saturday, July 22, Graham submitted the proposal to the Band. According to Wes Pinay, his grandfather Clifford Pinay and Joe Desnomie told him that Graham drove up during a ball game with a suitcase full of money and said to those gathered:

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[176] "Memorandum of Agreement," June 21, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 510–11). The full text of the "50 Fifty Pupil Agreement" is found at Appendix E.

> I want to make an offer. If you allow me to bring some more ex-pupils, I'll give you each $20, and I'll wipe that – there was a whatever you call that curfew where you couldn't go and visit other – your relatives on other reserves, I'll waive that he says if you allow me to do this, so then some of these old fellows that didn't speak English, they got behind Graham's back, and he didn't see it, and these old guys asked the interpreter [Joseph Ironquil] says what is he – what he is really trying to do. He says he wants to give you $20 each so that you can – if you'll allow him to bring some more people in the band, into the band, and one of these old timers I guess he told him like in Cree he says namoya, no way, so anyway, he didn't – he didn't get – didn't get enough show of hands. He announced, you know, like he said okay, everybody a show of hands he says, and if you all show your hands he said I'll give you all each $20, but some of these old timers balked at that, and they said no. We – like in their Cree language they said we know what you're up to, so it didn't go through.[178]

In his report dated July 24, 1911, Graham stated that 20 members voted against the proposal with 14 members voting for; he expressed surprise at this negative result, blaming Joseph Ironquil, who transferred into the band in 1906, for heading the opposition to the agreement: "A serious mistake was made the day this man was admitted to the Colony and if there is any way by which he could be removed it would mean a great deal for the future harmony and progress of the Colony."[179] Graham did not identify any members who attended the meeting.

Graham persisted with his plan, however, and indicated in his report: "Two or three of the Indians have spoken to me since the vote was taken and asked that if a petition signed by the majority of the Indians were presented asking for another meeting, would it be held, and I would be glad to know by wire or receipt of this letter if you will approve of another vote being taken should the petition be presented."[180] Graham's report was stamped received in Ottawa on July 27.[181] A day later, Graham was informed by telegram that another vote could be taken if a petition was presented, since the department considered it "highly important that this arrangement be accepted by the Indians."[182]

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[177] J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, June 27, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 513).

[178] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 206, Wes Pinay).

[179] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, July 24, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 517–19).

On August 23, 1911, Graham submitted the signed agreement dated July 29, 1911, and reported:

> [A]fter having received a petition signed by the majority of the voting members of the Band I again submitted the memo of agreement asking for the admission of fifty graduates to the File Hills Colony. The vote was taken and stood as follows, 23 for the agreement and 10 against. I herewith enclose the Agreement duly signed by the principal men of the Band.
>
> The Pay sheets will be forwarded on receipt of certain receipts from several absentees.[183]

According to this report, Graham claimed to have received a petition to hold a second vote and obtain the approval of the Peepeekisis Band for the agreement. However, there is no other mention or record, either in the oral evidence or the documentary record, of any petition having been sent to the department, nor is there mention in Graham's account of the notice given for the second meeting. Also absent from Graham's report was a record of the vote, specifying who voted for and against the proposal. The signatories of the agreement attested to a favourable vote by the majority of the band members, at least 22 of whom had transferred into the Band as colonists. In his August 23 letter,

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[180] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, July 24, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 518).

[181] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, July 24, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 517).

[182] J.D. McLean to W.M. Graham, July 24, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 520).

[183] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, August 23, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 532).

Graham described the 12 signatories as the "principal men of the Band." They were: Jose McNabb, Henry McLeod, Joseph McKay, Ernest Goforth, J.L. Moore, A. Brass, Fred Dieter, J.R. Thomas, Clifford Pinay, George Kewaytin, Roy Keewatin, and Robert Akapew (all of them transferees except Goforth). It is interesting to note that Graham did not include the interest distribution paylists, which identified band members who received their $20, because he was waiting on "certain receipts from several absentees."[184]

On August 29, Graham submitted the paylists, verifying that the band members were paid for the agreement, and a credit voucher accounting for the proceeds of the cheque that was sent to him previously for the disbursement.[185] On September 11, McLean returned the paylists to Graham asking him to "fill them out properly and also sign the declaration at the back of the book."[186] In a letter dated September 16, 1911, and marked as received by the department on October 7, 1911, Graham returned the paylists attaching the Indian Agent's declaration dated October 4, 1911, attesting to the interest payment.[187] According to the paylists, all the band members appear to have accepted the payment of $20, with the exception of Stephen Wells, who was absent, and Louie Desnomie.[188] Desnomie's granddaughter, Elizabeth McKay, explained why he refused: "[M]y grandfather said no, I'm not signing it because I'm not going to give my reserve away. I'm not going to sell it to anybody. This is what he told us. That's why he didn't want to get that 20."[189]

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[184] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, August 23, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 532).

[185] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, August 29, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 524–31, 534–35).

[186] J.D. McLean, Assistant Deputy and Secretary, to W. M. Graham, Inspector of Indian Agencies, September 11, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 536).

[187] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, September 16, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 530, 537).

[188] J.D. McLean, Assistant Deputy and Secretary, to Graham, September 11, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 536); Graham to the Secretary, Department of Indian Affairs, September 1911, enclosing the completed paylist for the Fifty Pupil Agreement, dated July 29, 1911, NA, RG, 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 537).

[189] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 134, Elizabeth McKay).

In 1954, Joseph Ironquil testified at the Trelenberg Inquiry that there were two meetings in 1911. At the first meeting, he "stood on the platform and talked against [the agreement]."[190] The agreement was rejected, but "[t]hree days after that, again they called a meeting ... Mr. Miles, he was Farm Instructor in those days. The notice couldn't get around fast enough, but he went around on horseback to let people know to come in three days after."[191] The second meeting was held in Graham's office, where money was placed on a table.[192] In his testimony, Ironquil noted that the agreement was passed at this meeting, but on further questioning added that two runners – he identified them as being Ernest Goforth and James Moore – went out before the second vote to get a few more votes.[193]

As noted above, Ernest Goforth was the only *original* band member to have signed the agreement. In oral testimony before the Trelenberg Inquiry in May 1954,[194] as well as in letters written in February 1952,[195] January 1955,[196] and March 1956,[197] he consistently recounted the same story – that there were two meetings or votes held two days apart, and that the agreement was passed at the second gathering. In the March 1956 letter, he indicated that the first meeting took place in the lobby of Graham's office on July 29 (as opposed to a baseball field on July 22):

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[190] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, p. 181 (ICC Exhibit 6A, p. 189, Joseph Ironquil).

[191] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, p. 181 (ICC Exhibit 6A, p. 189, Joseph Ironquil).

[192] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, p. 183 (ICC Exhibit 6A, p. 191, Joseph Ironquil).

[193] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, p. 183 (ICC Exhibit 6A, p. 191, Joseph Ironquil). It is not clear if Ironquil meant that three days passed between the meetings, or that three days passed before Miles told people to come again three days later (making it six days between the meetings, which reflects the documentary evidence more closely). Tallant, who was questioning Ironquil, expressed an understanding that Ironquil meant that three days passed between the meetings, and Ironquil did not interrupt to correct him.

[194] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, p. 39 (ICC Exhibit 6A, p. 43, Ernest Goforth).

[195] Ernest Goforth, Belcarres, to M. McCrimmon, Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, p. 651).

[196] Ernest Goforth to H.M. Jones, Director of Indian Affairs, January 25, 1955, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, p. 766).

[197] Ernest Goforth to J.W. Pickersgill, SGIA, March 15, 1956, NA, RG 10, vol. 7111, file 675-3-3-10, part 2 (ICC Exhibit 1, p. 795).

> On July 29th 1911 there was a semblance of a meeti,ng but there was no order of Parlimentary [sic] Procedure. Mr Graham tried to crowd the Indians into the little lobby of his office and there explained what he wanted. I remember I stood at the door half in and half out trying to see and hear what was happening. What I saw was two Sachels on the desk lying opened and each full of paper money. A Bribe, I call it, because this happened just before the Regina Exhibition. Easy money to take in the fair. A Vote was taken on Mr. Graham plan and was defeated. However Mr Graham was not to be beat, and so the next day he sent runners out. (I have their names) to get names of Indians whom were not at the Agency on the first day that gave him enough names to pass the issue. I like to repeat the stand I took at that time because it is the only time an original member of the Peepeekesis band was influenced by an Iron Curtain Procedure along with a tongue lashing from Mr Graham and so I too, too took the twenty dollars.[198]

According to Roy Keewatin's testimony, voters were not only brought to the agreement, but the agreement was brought to at least one voter. Mr Keewatin gave the following account at the Trelenberg Inquiry:

> Mr. Miles brought the Agreement to my door. He says, "here, this an Agreement to allow 50 ex-pupils from different Schools," that is what he told me. Well, I had a kind of argument there with him for a little while, and I said, "50". I said, "they will take up all our Reserve", "But no," he says, "there is $20.00 coming to you." Well finally, if I remember rightly, I signed.[199]

During the 1954 Trelenberg Inquiry, Albert Miles, the farming instructor, corroborated Goforth's testimony that a meeting was held in Graham's office to discuss the Fifty Pupil Agreement, at which he attended "by chance," and that it "was the only meeting that I ever knew of them holding at the File Hills Agency to my knowledge."[200] After further questioning, however, he admitted that he had heard of, but did not attend, another meeting held several weeks previously, at which the agreement had been rejected.[201] Miles added, however, that, as far as he remembered, the vote passed unanimously at the meeting held in Graham's office.[202] Miles's testimony concerning the unanimous vote count and the duration of time between meetings is contradicted by the historical record and the testimonies of elders in all the inquiries. It certainly contradicts the testimony of Wes Pinay, who said that it was not approved at the second meeting, but that "somehow or other he [Graham] got Ottawa to believe that they had agreed upon that agreement."[203] His father, Clifford Pinay, a signatory to the 1911 agreement, told him that it was "a rush-up deal."[204]

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[198] Ernest Goforth to J.W. Pickersgill, SGIA, March 15, 1956, NA, RG 10, vol. 7111, file 675-3-3-10, part 2 (ICC Exhibit 1, p. 795).

[199] Trelenberg Inquiry, Transcript of Proceedings, May 25-28, 1954, p. 222 (ICC Exhibit 6A, p. 230, Roy Keewatin).

Not all people who testified before the Trelenberg Inquiry criticized the methods used by Graham to secure the successful vote for the agreement. David Bird was one of the first to be admitted into the Peepeekisis Band on the authority of the Fifty Pupil Agreement in 1912,[205] although he was farming on the reserve a year previously. Bird, a farmer, freely offered his opinion:

> I have some information gathered from different sources. I think, as a representative of my people on the Reserve here, that I should, as much as I can to my ability, see that this 1911 Agreement to allow 50 people into this Reserve, was done legally. Therefore, to my knowledge, and from the facts that I have found that everything was done – everything was done that was possible to make that agreement legal as far as Mr. Graham was concerned. I give Mr. Graham a great credit and his staff at that

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[200] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, pp. 270–71 (ICC Exhibit 6A, pp. 280–81, Albert Miles).

[201] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, p. 272 (ICC Exhibit 6A, p. 282, Albert Miles). Miles was 81 years old at the time of this hearing; as he himself pointed out: "Fifty years is quite a while to go back."

[202] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, p. 271 (ICC Exhibit 6A, p. 281, Albert Miles).

[203] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 210, Wes Pinay).

[204] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 217, Wes Pinay).

[205] W.M. Graham to the Secretary, April 13, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 542).

> time for what they done for the Indians, for the graduates of the Indian Residential Schools and other schools as well.[206]

There are no clear answers to many of the questions surrounding the Fifty Pupil Agreement, given the conflicting evidence of some of the witnesses during the 1954 Trelenberg Inquiry. Gilbert McLeod, nevertheless, offered the following summary of the whole process: "[T]hey had meetings with Graham, but as I had said, he was absolute in everything that he had said. He could not be questioned."[207]

Shave Tail's Complaint, 1912

By April 1912, approval was sought by Graham for the admission of the first five graduates under the Fifty Pupil Agreement: Moise Bellegarde, Noel Pinay, David Bird, Prisque LaCree, and Matthew Low.[208] A month later, J.D. McLean approved the transfers which, according to the Fifty Pupil Agreement, he was entitled to do without obtaining Consents to Transfer from the Peepeekisis Band.[209] In July 1912, however, the department received a letter of complaint regarding Graham and the Colony. It was from Shave Tail, who wished to assume his deceased father's place as Chief of Peepeekisis Band but had not approached Inspector Graham in this regard. He deemed such a course of action futile because "I know he won't listen to me."[210] Shave Tail continued as follows:

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[206] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 196 (ICC Exhibit 6A, p. 204, David Bird).

[207] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 52–53, Gilbert McLeod). See also affidavit of Alex Nokusis, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, p. 62).

[208] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, April 13, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 542–43).

[209] J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, May 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 545); J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, May 20, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 547); and J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, May 20, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 548).

[210] Shave Tail to J.D. McLean, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 549).

> If you cannot get me the position I intend on leaving the Reserve and go to another because I don't own anything in my reserve, specially when Graham is here. I can't get no help of any kind from Graham. I had built a good house on my quarter and broke about 40 acres and Graham took this farm for his own use. Therefore I am out of farm and [have] no means to restart myself again.
>
> It is a funny way when I see parties not been in treaty are farming on our Reserve and treated better and helped by ... [page ends]
>
> I hope you will do all you can to help me and do what you [can] for me.[211]

McLean responded shortly afterwards, indicating that this was the first that the department had heard of the matter and that, if Shave Tail had any grounds for complaint, he should speak to his Agent, Mr H. Nichol. McLean also added: "As for your charges against Inspector Graham, the Department could not take any action in this matter unless they were supported by strong evidence."[212] Don Koochicum's testimony supports Shave Tail's letter: "He [Shave Tail] was a farmer, and when Graham took over the whole charade I believe he pushed Shavetail down to the west end."[213] He also notes: "[W]e still recognized Shavetail as our hereditary chief in our traditional way, but he wasn't recognized by Graham."[214]

Response of *Original* Band Members

In 1907 or 1908, Edwin Nokusis, son of *original* band member Nokusis or He Is Coming, returned from his schooling at Lebret and, according to his son Daniel Nokusis, found the following conditions:

> [H]e went out visiting relations, and to his surprise, you know, he found the band much smaller than it was before, and he kept asking them where are they he says. Did they die too? No, they said. They said life was getting too rough, and they didn't like it, so they just rode off in the night and back to Cypress Hills. ...

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[211] Shave Tail to J.D. McLean, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 549–50).

[212] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Shave Tail, Abernathy, SK, July 12, 1912, NA, RG 10, vol. 3940, file 121698-14 (ICC Exhibit 1, p. 552).

[213] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 247, Don Koochicum).

[214] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 264, Don Koochicum).

> And Alec Nokusis' mother left and went and lived with old Mestatic [phonetic], and he took Alec Nokusis along, and he became a band member of Okanese.[215]

Alex (or Alec) Nokusis was Edwin's half-brother. The historical record does not indicate the year Alex left the Peepeekisis reserve for the Okanese reserve. Alex briefly returned from the Okanese reserve in 1921.[216] On March 22, 1932, the Indian Agent at File Hills sought the approval from the department for A. Nokusis and two other Peepeekisis band members to join the Okanese Band where they had been farming for a number of years.[217] Alex himself explains: "Soon members of the Band living on the land Graham selected for his Colony began to get squeezed out of it. Squeezed out until one day I also had to move away from there. There was no room for me there. This caused my transfer to Okanese Band."[218]

According to Daniel Nokusis' account of his father's return, Edwin Nokusis was not only surprised to find many *original* band members gone but also surprised to find many of his old schoolmates settled on reserve land in the Colony and receiving assistance from the department.[219] Nevertheless, he requested assistance from Graham to start his own farm and received a walking plow and two oxen instead of the horses he asked for.[220] Edwin Nokusis found working the land with oxen to be cumbersome and slow and became frustrated to a point where he slaughtered the oxen and distributed the meat to other band members.[221] Shortly thereafter, Edwin Nokusis left the reserve and joined the Regina Rifles and ultimately had a distinguished military career overseas in World

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[215] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 304, Daniel Nokusis).

[216] Treaty annuity paylist, Peepeekisis Band, 1921 (ICC Exhibit 3E, p. 465)

[217] George Dodds, Indian Agent, to the Secretary, Department of Indian Affairs, March 22, 1932, NA, RG 10, vol. 7969, file 62-111, part 2 (ICC Exhibit 1, p. 591).

[218] Affidavit of Alex Nokusis, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, p. 62).

[219] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 302–3, Daniel Nokusis).

[220] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 305–6, Daniel Nokusis).

[221] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 307, Daniel Nokusis).

War 1.[222] According to Daniel Nokusis, when his father returned to the reserve several years later, he continually asserted his right to the entire reserve, even if it meant riding "right across their crop on horseback, and they tell him you shouldn't do that. He said this is my reserve. I can go wherever I like."[223]

The Colony at Its Peak, 1910s to 1920s

The Colony continued to grow in numbers. Not all who applied to farm in the Colony were accepted. In 1913, approval was sought for two ex-pupils from Brandon Industrial School to transfer to the Colony; however, permission was refused because they were "half-breeds" and, according to the department, could not be considered.[224] In his report on the "Ex-pupil colony at File Hills" for 1913–14, Graham indicated that there were "33 farmers on the colony and a total population of 134 souls."[225] He had much praise for the progress of the Colony:

> One has seen this colony grow from a very small beginning in 1902 to what it is to-day, – a thrifty settlement producing as much per acre as is done by the surrounding white farmers, and in many cases individuals have an acreage under cultivation equal to that of the best white farmers.
>
> It will, perhaps, be interesting if I quote some cases of individual prosperity that I think prove beyond a doubt that the Indians are not only holding their own with the average white farmer, but in some cases are surpassing them.
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> ...
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> I can give most encouraging reports as to the manner in which these young people live. Without doubt there is a marked improvement as each year goes by.[226]

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[222] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 307-8, Daniel Nokusis).

[223] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 316, Daniel Nokusis).

[224] J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, June 5, 1913, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 558).

[225] "Report of W.M. Graham, Inspector of Indian Agencies, on the Ex-Pupil Colony at File Hills, Sask.," Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1914*, part 2, p. 229 (ICC Exhibit 1, p. 564).

[226] "Report of W.M. Graham, Inspector of Indian Agencies, on the Ex-Pupil Colony at File Hills, Sask.," Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1914*, part 2, pp. 229–30 (ICC Exhibit 1, pp. 564–65).

Of the colonists cited, Graham named four individual colonists who each had between 240 and 312 acres of land under cultivation.[227] By 1915, the Colony had grown to 36 farmers and their families, and had over 3,000 acres of land under cultivation.[228]

The success of the Colony became internationally known. In 1914, Frederick Abbott, secretary of the American Board of Indian Commissioners, visited the Colony during his eight-week study of Canada's Indian affairs administration. In his 1915 report, Abbot was highly complimentary of the "simplicity, comprehensiveness, elasticity and efficiency" of Canada's Indian affairs policy and presented the File Hills Colony as the best illustration of the Canadian system.[229] The File Hills Scheme would draw similar praise in numerous articles and reports in subsequent years, particularly for the many contributions of its members during World War I. Numerous dignitaries, including royalty, would come to tour the File Hills Colony. Sarah Carter, in her article concerning the File Hills Colony, noted:

> In western Canada land surrenders were enthusiastically pursued by Graham. He handled the negotiations for the surrender of large tracts of land from the Pasquah, Muscowpetung, Cowesses and Kakewistahaw bands between 1906 and 1909, reserves in the same district as File Hills. At the same time as he urged bands to sell their agricultural land, Graham was heralded as the person who had done more than any other to promote farming among aboriginal people. "To him," it was boasted in a 1921 Free Press article, "belongs the very proud distinction of being the first man to solve the problem of making the Indian take kindly and successfully to farming." Graham was an extremely astute promoter, conveying the impression through the colony that a great deal was being done to assist reserve farmers. The colony was a carefully orchestrated showpiece for the public, and a means of enhancing Graham's own reputation and opportunity for advancement.[230]

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[227] "Report of W.M. Graham, Inspector of Indian Agencies, on the Ex-Pupil Colony at File Hills, Sask.," Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1914*, part 2, pp. 229–30 (ICC Exhibit 1, pp. 564–65).

[228] Sarah Carter, "Demonstrating Success: The File Hills Farm Colony" (fall 1991) 16 no. 2 *Prairie Forum* 157 (ICC Exhibit 10A, p. 1).

[229] Sarah Carter, "Demonstrating Success: The File Hills Farm Colony" (fall 1991),16 no. 2 *Prairie Forum* 158 (ICC Exhibit 10A, p. 2).

[230] Sarah Carter, "Demonstrating Success: The File Hills Farm Colony," (fall 1991) 16 no. 2 *Prairie Forum* 160 (ICC Exhibit 10A, p. 4). See also S.J.M., "Canada's Indians and the War; Fighting and Contributing Money," *Ottawa Journal*, February 27, 1917, p. 4 (ICC Exhibit 1, p. 582).

File Hills, 1918–35

In 1918, Graham was appointed Commissioner for Greater Production, a position soon transformed into that of Indian Commissioner.[231] During the October 1956 McFadden hearing, Ernest Goforth testified: "Around 1910–11–12, something like that, 'Old Feather' and 'Buffalo Bow' took it upon themselves to go to Glen Campbell [a member of Parliament at Ottawa] to make certain protests ...Well 'Buffalo Bow' was sent to live by himself and he went and he kept quiet. That's the way we were handled."[232]

Graham remained Indian Commissioner, stationed in Regina, until 1932, when the position was eliminated from the civil service, and Graham was forced to retire.[233] An incident recounted several times by elders appears to have occurred while Graham was stationed in Regina. Jessie Dieter (her father-in-law was Fred Dieter and her father was from one of the File Hills reserves) explained:

> [H]e [Graham] was very mean to them, so later on when things I guess were getting better he used to send them to the exhibition and put them on the train, take all their teepees and everything and set them up at the exhibition grounds ... the chief said get ready ... get dressed up, put all your costumes on, we're going to go and see Mr. Graham downtown, so they all got ready, took the bus and went to visit him.
>
> He was in his office. He wasn't expecting them. They all piled into his office. He was sitting behind his desk, and they told him they came to visit him after being so mean to them ... and my father said he started to cry loud, and he said he was sorry for being mean to them. I guess he was really very mean to them.[234]

Although he had been appointed Indian Commissioner and was stationed in Regina, Graham nevertheless remained involved in the management of the File Hills Scheme, sometimes without the authority or permission of the department in Ottawa. In 1931, a year before his retirement, Graham

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[231] Marian Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996 (ICC Exhibit 9A, pp. 4–5).

[232] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 60, Ernest Goforth).

[233] Marian Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996 (ICC Exhibit 9A, pp. 4–5).

[234] Transcript of Proceedings, September 11–12, 2002 (ICC Exhibit 5A, pp. 99–100, Jessie Dieter).

Cree Indian Encampment at Regina Exhibition, 1923.
Glenbow-Alberta Archives, NA-901-2.

wrote to the Secretary on behalf of the Indian Agent at File Hills in reference to the transfer of Pat LaCree from the Little Black Bear Band to Peepeekisis.[235] LaCree had been farming in the Colony since 1921, and his membership was called into question by the department since no formal transfer papers were issued. Graham stated that LaCree was well established on the reserve and "there is no question as to where he should be paid. Surely the Department will not take exception to my making a ruling of this kind. The pay-sheets should have stated that this transfer was made on the instructions of the Indian Commissioner if they did not."[236] Graham also remarked that the Little Black Bear Band had previously surrendered a portion of their reserve and that LaCree had received annual interest payments which Graham admitted "was wrong."[237] Authority was quickly given for the transfer; however, Graham was admonished by the Secretary:

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[235] W.M. Graham, Indian Commissioner, to the Secretary, Department of Indian Affairs, January 23, 1931, NA, RG 10, vol. 7969, file 62-111, part 2 (ICC Exhibit 1, p. 587).

[236] W.M. Graham, Indian Commissioner, to the Secretary, Department of Indian Affairs, January 23, 1931, NA, RG 10, vol. 7969, file 62-111, part 2 (ICC Exhibit 1, p. 587).

[237] W.M. Graham, Indian Commissioner, to the Secretary, Department of Indian Affairs, January 23, 1931, NA, RG 10, vol. 7969, file 62-111, part 2 (ICC Exhibit 1, p. 587).

> The Department is always ready to receive and consider suggestions from you, and it is thought that in this particular case, the Department should have been informed of what you had done. ... As you are well aware, it is quite necessary to have the authority on file to refer to in case any question should arise in the future regarding the same.[238]

A second membership "irregularity" occurred in 1934, when George Dodds, Indian Agent at File Hills, discovered that four men from Okanese Band had been transferred to Peepeekisis Band in 1915 and 1919 without their being aware of it. Dodds stated that Harry Stonechild, Alex Stonechild, Jack Walker, and James Tuckimaw "originally belonged to Okanese Band and have never resided on any other reserve, and it would seem that they were transferred to Peepeekisis Band improperly."[239] The transfer was approved by the department with no explanation a month later.[240]

Although Dodds reported on such irregularities, it has been alleged that he committed some himself. George Leslie Brass recounted that, when a fire started in the garage where the agency records were kept, he and another man began to fight the fire, but were told by Dodds not to bother.[241] All the records were destroyed.

In 1935, G.A. Matheson, Registrar for the department, stated that "the population of the File Hills Reserves is as follows:– Peepeekeesis (including the File Hills Colony) 286; Okanese 79, Star Blanket 62 and Little Black Bear 43."[242] In 1935, Joseph Desnomie became the first Chief of

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[238] A.F. MacKenzie, Secretary, to W.M. Graham, Indian Commissioner, January 27, 1931, NA, RG 10, vol. 7969, file 62-111, part 2 (ICC Exhibit 1, p. 588).

[239] George Dodds, Indian Agent, to the Secretary, Department of Indian Affairs, January 5, 1934, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 594).

[240] A.F. Mackenzie, Secretary, to George Dodds, Indian Agent, February 27, 1934, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 595).

[241] Affidavit of George Leslie Brass, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, pp. 68–69).

[242] G.M. Matheson, Registrar, note to file on the "File Hills Reserves," January 23, 1935, no file reference (ICC Exhibit 1, p. 599).

Peepeekisis Band recognized by the department since the death of Chief Peepeekisis some 45 years previously.[243]

PROTESTS AND INVESTIGATIONS RELATING TO THE FILE HILLS COLONY

During the 1940s and 1950s, four separate investigations were held into the Peepeekisis Band's membership as a result of the implementation of the File Hills Scheme.

McCrimmon Investigation into Band Membership, 1940s

In July 1945, D.J. Allan, Superintendent of Reserves and Trusts at the Indian Affairs Branch, prepared a memorandum regarding the question of Peepeekisis band membership. His analysis of the four bands within the File Hills Agency led him to believe an investigation was in order:

> The Little Black Bear Band, who have large cash assets, have decreased from 72 to 60 in forty-four years. During the same period their neighbours, the Peepeekeesis Band, have increased their membership from 66 to 365. It is suggested that there have been influences other than natural ones operating and it may well be that an investigation into the Band membership of the Peepeekeesis Band, whose original members have been pauperized in the process, is indicated.[244]

In March 1947, J.B.Ostrander, Inspector of Indian Agencies in Saskatchewan, submitted to Allan a memorandum concerning the "status of Indians shown in the Treaty books of the Peepeekisis Band of the File Hills Agency."[245] Attached to this memorandum were two lists, one entitled "Original Members of Peepeekisis Band," and the other entitled "Indians Presently Shown as Members of Peepeekisis Band Whose Status Is Doubtful."Ostrander indicated that he had asked S.H. Simpson, Indian Agent at File Hills, to investigate the membership of all band members of the Peepeekisis Band. In this regard, he added:

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[243] Violet Kayseass, Registration, Revenues and Band Governance, DIAND, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7).

[244] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, memorandum for file "Re: Band Membership," July 27, 1945, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 613).

[245] J.P.B. Ostrander, Inspector of Indian Agencies, to D.J. Allan, Superintendent of Reserves and Trusts, Indian Affairs Branch, March 21, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, pp. 614–19).

> I believe we can assume that the early admissions, if supported by a favorable majority vote of the Band, and duly confirmed by the Department, would be in order. Also that their votes and the votes to direct male descendants when recorded favorably in subsequent applications for membership, would make such admissions, when confirmed by the Department, also in order.
>
> It would appear to me that there are two other classes of admissions which are definitely not in order –, those where no vote was taken, and those where a vote was taken and recorded as a majority in favor, but where a number of those voting favorably had, through irregularity of their admissions to the Band, no right to vote.
>
> If it is the intention of the Department to proceed with a further investigation of every individual case, and to remove from the reserve all of those and their descendants, who were improperly admitted, the matter will have to be brought to a head at an early date, because of the fact that some of these doubtful members are being re-established by means of the Veterans Land Act grant, to say nothing of the fact that the reserve is getting over-crowded, and the Band is increasing in number rapidly, which means that the longer the matter is left unsettled, the greater will be the problem when it has to be done.[246]

Malcolm McCrimmon was appointed in April 1947 by the Minister of Mines and Resources, the department whose jurisdiction Indian Affairs was under, to conduct a more extensive investigation into "all questions of Band membership in the File Hills Agency."[247] Shortly afterwards, on April 17, Agent Simpson reported back to Inspector Ostrander, providing him with a list and analysis of 292 of 396 Peepeekisis band members whom he had determined were not originally part of the Band.[248] By June, however, Indian Affairs officials had discovered a "document signed by the members of the Peepeekeesis Band, by which certain graduates from Le Bret [sic] school were authorized to be located on the Peepeekeesis Reserve,"which prompted McCrimmon, writing on behalf of the Superintendent of Reserves and Trusts, to question the necessity of further investigation into the matter.[249] On June 20, McCrimmon informed Ostrander that the investigation should be suspended since the department had plans to "make a complete survey of the Indian membership from Coast to Coast."[250] McCrimmon reasoned that, "if at a later date when a complete investigation will be made we find it necessary to remove from membership any persons whose membership might at present be in doubt, it would be advisable that no action be taken until a thorough investigation be made into all Indian membership."[251]

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[246] J.P.B. Ostrander, Inspector of Indian Agencies, to D.J. Allan, Superintendent of Reserves and Trusts, Indian Affairs Branch, March 21, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 614)

[247] James Allison Glen, Minister of Mines and Resources, April 3, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 621). See also Director of Mines and Resources to the Deputy Minister of Mines and Resources, April 3, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 620).

[248] S.H. Simpson, Indian Agent, File Hills Agency, to J.P.B. Ostrander, Inspector of Indian Agencies, April 17, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, pp. 622–26).

This Commission heard evidence from Alice Sangwais, the granddaughter of Chief Peepeekisis and daughter of Shave Tail, who recalled:

> [T]his was called colony and this side was Peepeekisis. It was all Peepeekisis, and this side was the colony, and I remember my dad, I was only about five years old, we come here for water. There was a spring here along here. I come here with my dad with a stone wood and a horse, and we were getting – my dad was getting water when an old man from the colony come and slapped my dad and told my dad to get out of here. You can't get water from here. You got your own on this side they were telling him.[252]

When questioned further about her thoughts about Shave Tail's understanding of the distinctiveness of the two groups, Mrs Sangwais stated:, "It was two reserves. ... It still is a colony and Peepeekisis. It's two reserves going on one reserve."[253] This Commission also heard evidence from Don Koochicum, who recounted stories about being denied access to lands that were part of the Colony and about the poverty of his family: "[W]e lived in a sod hut until 1951. It was dirt floor, and we used to wake up in the morning and have frost on our heads and everything like that, and we had no winter clothes. If it wasn't for Miss Drake, he used – she used to bring us toques and knitted mitts from – from up here, and that's how we survived."[254]

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[249] Malcolm McCrimmon, for the Superintendent of Reserves and Trusts, Ottawa, to J.P.B. Ostrander, Inspector of Indian Agencies, June 16, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 628). It is assumed that the document referred to was the Fifty Pupil Agreement.

[250] Malcolm McCrimmon, for the Superintendent of Reserves and Trusts, to J.P.B. Ostrander, Inspector of Indian Agencies, June 20, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 629).

[251] Malcolm McCrimmon, for the Superintendent of Reserves and Trusts, to J.P.B. Ostrander, Inspector of Indian Agencies, June 20, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 629).

[252] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 33–34, Alice Sangwais).

[253] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 35, Alice Sangwais).

Original Band Members Request Royal Commission, 1947–50

In February 1948, Ernest Goforth, Edwin Nokusis, Frank C. Koochicum, Koochicum Sr, and Mrs Shave Tail all petitioned the government to appoint a royal commission to look into the issue of band membership. The petition stated:

> Indians admitted to band membership in or about the year 1902, as a part of a farming scheme developed by Mr. Graham, former Indian Agent, were improperly brought upon the reserve and improperly given a share of the band assets. We state that all such persons are without lawful right, living upon the lands of the band contrary to the treaty entered into by the Queen and the Indians of Canada at Fort Qu'Appelle; and we respectfully request the Government of Canada to appoint a Royal Commission to investigate and make recommendations with respect to membership in the said band as soon as possible, in the manner followed by Honourable Mr. Justice W.A. McDonald of the Court of Appeal of Alberta with respect to Indian bands in that province; and we further request that appropriate action be taken with regard to the matter of membership in the said band.[255]

The petition was referring to a Royal Commission headed by W.A. McDonald that investigated band membership in the Lesser Slave Lake Agency. No formal response to the petition came from the department; however, in a February 1952 letter, an Indian Affairs Branch official indicated that, because the *Indian Act* was in the midst of being revised in 1947, no action was taken as a result of the petition.[256]

In April 1950, the *original* members raised the matter once again, this time through their lawyer, M.C. Shumiatcher, indicating that the "Indian Superintendent for the File Hills Colony," Frank Booth, had met with members of the File Hills Colony and that $10,000 from band funds was made available to them for improvements to the lands within the Colony.[257] The *original* members were very opposed to this and reiterated their request for a commission to investigate Peepeekisis band membership.[258] The department initially froze all of the Peepeekisis band funds; however, on the advice of J.B. Ostrander, by now Regional Supervisor of Indian Agencies, the department decided to freeze only funds available for "distribution purposes or individual benefits" and make available funds for the road work since it would not be detrimental to any Indians of the Band.[259] In August 1950, counsel for the *original* members wrote to complain that, as the construction of a road in the reserve had resumed, the department had broken its promise not to authorize any expenditure of band funds until the question of band membership was finalized.[260] Shortly thereafter, having determined that all those living on the reserve, including the *original* members or protestors, would benefit, the department replied:

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[254] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 251, 259–60, Don Koochicum).

[255] Ernest Goforth et al., Petition to the Government of Canada, February 10, 1948, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 630).

[256] W.J.F. Pratt, General Executive Assistant to H.S. Athey, Office of the Minister of Agriculture, February 21, 1952, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, p. 659).

> [T]he concern of the Peepeekisis Indians is understood by us. They wish, and rightly so, to avoid individuals not qualified for membership in the Peepeekisis Band benefiting by expenditures from a fund of which they own no share. For this reason we have long since discontinued distributions of cash to any members of the Peepeekisis Band and in the same way, no expenditures for relief are made from Peepeekisis Trust Account. We feel that these presentions [sic] adequately safeguard the interests of bona fide Peepeekisis Band members.
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> Therefore, after reconsideration of the situation the whole matter was placed before the Minister for a decision and it was with his approval that the expenditure for road work on the Peepeekisis Indian Reserve, at the cost of their Band Funds, was authorized.[261]

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[257] M.C. Shumiatcher, Shumiatcher & McLeod, Barristers and Solicitors, to D.M. MacKay, Director, Indian Affairs Branch, April 26,1950 (NA, RG 10, vol. 7679, file 62-111, part 1 (ICC Exhibit 1, pp. 631–32).

[258] Shumiatcher & McLeod, Barristers and Solicitors, to D.M. MacKay, Director, Indian Affairs Branch, April 26, 1950, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, pp. 631–32).

[259] J.P.B Ostrander, Regional Supervisor of Indian Agencies, to Indian Affairs Branch, May 10, 1950, NA, RG 10, vol. 675/3-3-10, vol. 2 (ICC Exhibit 1, pp. 636–37).

[260] D.G. McLeod, Shumiatcher and McLeod, to D.M. McKay, Director, Indian Affairs Branch, August 4, 1950, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, pp. 638–39).

[261] D.A. McMay, Director, to Messrs Shumiatcher and McLeod, Barristers, August 21, 1950, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 641).

Response of Band Members, 1950–52

The individuals who arrived at Peepeekisis from other bands and were admitted as members, and whose membership was later disputed, were called the "protested" members; the *original* band members who challenged the validity of these memberships were called the "protestors." In May, 44 band members signed a petition requesting "that the investigation be cancelled and that membership of this Band be solely determined by the 1949 paylist."[262] Yet, when Ostrander forwarded this petition to Ottawa, he recommended that no action be taken in connection with the petition and that the band membership investigation be completed "at the earliest possible date."[263]

In February 1952, because they were not receiving their "oil lease money" along with the other File Hills Bands, Peepeekisis band members wrote to their provincial Member of the Legislative Assembly about the matter: "We of the Peepeekisis Reserve and the File Hills Colony do not believe or know anything different from the past administration but we are legal members as we are. If there is any illegality about the situation it could only be of the representatives who were entrusted to carry on the affairs of the Indian Department."[264] This letter was forwarded on to the Indian Affairs Branch.[265]

The consequences of the 1948 petition and the response from the protested members had a dramatic effect upon the administration of all Peepeekisis band members in the next decade. The source of social assistance for the entire band was arbitrarily taken away from them by the department. Also taken away from the protestors was their ability to access the band's accounts to pay for their legal counsel. In February 1952, a petition, signed by the protestors, was forwarded to the department asking for a sum of money to be forwarded to Shumiatcher and McLeod on account of legal fees and disbursements relative to the determination of membership of the Band.[266] The department's response questioned the protestors' need for legal representation and stated that the "situation will be dealt with under the Section of the Statute which applies and when a point is reached where legal advice in the matter is needed, steps will be taken at that time to arrange for this service."[267]

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[262] Frank Booth, Superintendent, to the Indian Affairs Branch, May 4, 1950, enclosing a petition from members of the Peepeekisis Band, dated April 13, 1950, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 633–35).

[263] J.P.B Ostrander, Regional Supervisor of Indian Agencies, to Indian Affairs Branch, May 10, 1950, NA, RG 10, vol. 675/3-3-10, vol. 2 (ICC Exhibit 1, p. 636).

[264] A.H. Brass, Regina, to V. Deshaye, MLA, Melville, SK, February 9, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, pp. 649–50).

[265] W.J.F. Pratt, General Executive Assistant, to H.S. Athey, Office of the Minister of Agriculture, Ottawa, February 21, 1952, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, p. 659).

Formal Protests of the Band Membership List, 1951–53

In 1951, in order to comply with the newly revised *Indian Act*, the Indian Affairs Branch publicly posted a "Membership List of Peepeekisis Band of Indians as it Appears in Departmental Records as at June 30, 1951."[268] Band members were informed that, in accordance with the new provisions, protests about the accuracy of the list were to be submitted before March 4, 1952, and could be made by the Band Council, by any 10 electors, or by any three electors where the total number of electors was fewer than 10.[269] On February 20, 1952, as the deadline drew closer, Ernest Goforth wrote three letters to Malcolm McCrimmon. Goforth explained in the first letter that he had been authorized to represent the *original* members, whom he listed and from whom he had signed statements confirming this authorization.[270] In a second letter, he argued that, soon after Graham had been appointed Indian Agent at File Hills, it became "evident that he was the government of the reserve. He did not ask or tell the Indian anything. He made the Indian believe the reserve was one. Chiefs were not elected. Peepeekisis members were not asked for their consent when he was to survey our land to establish a colony. Band meetings were few."[271] Goforth asserted that Graham's farming Scheme, implemented without their consent, was to blame for their loss of the reserve to people who had been illegally brought into the Band, and he concluded with the request that he and another *original* member be called to Ottawa to give detailed information.[272]

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[266] J.T. Warden, Acting Superintendent, File Hills Qu'Appelle Agency, to Indian Affairs Branch, February 27, 1952, enclosing petition of February 14, 1952, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, pp. 660–61).

[267] D.J. Allan, Superintendent, Reserves and Trusts Division, to J.T. Warden, Field Agent, NA, RG 10, vol. 7111, file 675-3-3-10, part 1 (ICC Exhibit 1, p. 662).

[268] Malcolm McCrimmon, for Registrar, Indian Affairs Branch, letter and membership list posted on the Peepeekisis Reserve, c. June 30, 1951, file reference unavailable (ICC Exhibit 1, pp. 642–48).

[269] Malcolm McCrimmon, for Registrar, Indian Affairs Branch, letter and membership list posted on the Peepeekisis Reserve, c. June 30, 1951, file reference unavailable (ICC Exhibit 1, p. 642).

[270] Ernest Goforth to Malcolm McCrimmon, for Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 656–58).

Goforth addressed the Fifty Pupil Agreement in his third letter: "Because there are no forms for protest re the fifty pupil agreement I want to be allowed to explain it now. ... We could not protest. At that time we were too ignorant and did not have a choice to protest. Mr. Graham was the government of our band and of our minds."[273] Goforth alleged that in 1911 Graham held a second vote two days after the original vote defeated the agreement when he was supposed to wait at least 10 days; that Graham had laid the money out in front of people in order to influence their vote; and that many of those who had voted had not been voted in by *original* members of the Band.[274] At the end of February 1952, the protesting members completed 25 Indian membership protest forms.[275] On March 1, Goforth wrote back to the department stating that the Band had only received the proper protest forms a week previously and that there would be some delay in having the forms signed and returned.[276] Subsequent correspondence indicates that these forms were sent to the department shortly thereafter.[277]

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[271] Ernest Goforth to Malcolm McCrimmon, for Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 654).

[272] Ernest Goforth to Malcolm McCrimmon, for Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 654–55).

[273] Ernest Goforth to Malcolm McCrimmon, for Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 651).

[274] Ernest Goforth, Balcarres, SK, to Malcolm McCrimmon, for Registrar, Indian Affairs Branch, February 20, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, pp. 651–52).

[275] 25 "Indian Membership Protest" forms, dated February 29, 1952, file reference unavailable (ICC Exhibit 1, pp. 663–78, 680, 682, 684, 686, 688, 690, 692, 694, 696).

[276] Ernest Goforth to Mr McCrimmon, March 1, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 697).

[277] Shumiatcher & McLeod, Barristers and Solicitors, to Walter E. Harris, Minister of Citizenship and Immigration, December 6, 1952, NA, RG 10, vol. 7111, file 675/3-3-10, part 1 (ICC Exhibit 1, p. 708).

Trelenberg Inquiry into Band Membership, 1954

In spring 1954, L.L. Brown, Registrar, informed N.J. McLeod, Superintendent of the Fort Qu'Appelle Indian Agency, that Leo Trelenberg of Melville, Saskatchewan, was appointed "commissioner to investigate the Indian membership protests, Peepeekisis Band."[278] Brown also included a list of 26 "protested" members, the 25 people protested by the *originals* in February 1952, plus a protest of Ernest Goforth himself, whose membership was being protested by those families who arrived at Peepeekisis during the File Hills Scheme.[279] The first hearing, held between May 25 and 28, 1954, in Lorlie, Saskatchewan, heard evidence from Malcolm McCrimmon representing the Department of Indian Affairs; M.L. Tallant, counsel for those being protested against, with the exception of Ernest Goforth; Ernest Goforth, Charlie Koochicum, and Edwin Nokusis representing the protestors; Goforth, appearing on his own behalf as a protested member; David Bird and Francis Dumont who presented the case of those protesting Ernest Goforth; and 11 members who were protested themselves or who were appearing on behalf of a protested member.[280]

Shortly after the hearing finished, Trelenberg wrote to the Registrar, L.L. Brown, stating that during the proceedings of the inquiry, testimony from those protested referred to a "Mr. Miles" who was allegedly a person who notified band members of meetings between "1903-04 to 1912" concerning membership.[281] Miles was located by McCrimmon after the conclusion of the proceedings, and Trelenberg was of the view that the commission should be reopened to receive Miles's testimony.[282] Trelenberg also expressed his opinion as to the validity of the complaints and the complexity of the problem:

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[278] L.L. Brown, Registrar, to N.J. McLeod, Superintendent, Qu'Appelle Indian Agency, March 10, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 726–27).

[279] L.L. Brown, Registrar, to N.J. McLeod, Superintendent, March 10, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 726–27). Note: The protest form against Ernest Goforth was not found in the documentary record.

[280] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, July 2, 1954, pp. ii, 2 (ICC Exhibit 6A, pp. 2, 6).

[281] Leo Trelenberg to L.L. Brown, Indian Affairs Branch, June 1, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 730).

[282] Leo Trelenberg to L.L. Brown, Indian Affairs Branch, June 1, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 730).

> I would like to add too, that from the evidence adduced it would appear that those protesting the group of 25 have reason for complaint as it appears highly probable that some, if not all, were improperly admitted, though through no fault of their own and if this is so, then the Agreements of 1874 were not adhered to as is the contention of Mr. Goforth and his group (the protestors). On the other hand, as previously opined, these people are on the reserve through no fault of their own and have spent most, if not all of their lives there. It would seem an injustice to them if they were required to move off the reserve and also a non-compliance of the Agreement and an injustice to the original members if they were allowed to remain. As a matter of fact I would say that it would be a practical impossibility to now remove these established families from the reserve. ...
>
> The matter has not been discussed with anyone by Mr. McCrimmon but it seems to the writer that a monetary settlement in the form of a trust fund with the interest paid over annually to the protesting group (the original members) in exchange for a new agreement replacing the old is the only practical solution of this most intricate problem.[283]

The legal firm representing the protesting members, Shumiatcher, McLeod and Neuman, had not participated in Trelenberg's inquiry. On June 14, 1954, representatives of this firm wrote to Malcolm McCrimmon submitting a list of band members and requesting that their client be furnished with the following information and documentation pertaining to the protested members: the descent and ancestry of each person listed; the date and place of their birth; location and date of each person's first treaty payment; and the date, place, and circumstances of entry into Peepeekisis Band.[284] The counsel's list did not include Mark Ward who was one of the first 25 protested but added William Desnomie and Widow E. Poitras. On June 22, 1954, L.L. Brown, Indian Affairs Branch Registrar, replied that the information could not be made available for two reasons: first, the Trelenberg Inquiry was not yet completed and was to be reconvened on July 2, 1954, to take evidence of additional witnesses; and secondly, "we are unable to see that the production of the information requested, even if it were available, would implement the matter at this stage. Neither do we consider it essential that on behalf of your clients you have an opportunity to review all the evidence and comment on it before the Registrar makes his decision."[285] Brown concluded by stating that, if the clients of Shumiatcher, McLeod and Neuman did not agree with the Registrar's decisions, they could have them reviewed by a judge.[286]

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[283] Leo Trelenberg, Melville, SK, to L.L. Brown, Indian Affairs Branch, Ottawa, June 1, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 730–31).

[284] Shumiatcher, McLeod & Neuman, Barristers and Solicitors, Regina, to Malcolm McCrimmon, Registrar for Commission of Inquiry into Membership of Indian Bands, Indian Affairs Branch, June 14, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 732-33).

Shumiatcher, McLeod and Neuman replied that the firm did not take issue with the branch's position that "all evidence submitted to the Commissioner will be included in his report and made available to the parties ..."[287] but did point out that the lawyers had the right to receive and review any additional information in the departmental records that the Registrar planned to consider.

After consulting with the branch's legal advisor,[288] Brown again wrote to Shumiatcher, McLeod and Neuman on August 18, 1954, stating:

> If, following a Commission hearing and before the Registrar makes his decision, additional information is discovered, either in our records or elsewhere, which, if it had been presented to the Commission hearing, might have affected the Commissioner's findings, such information will be forwarded to the Commission for his study and he will then consider whether, in fairness to all the interested parties, an opportunity will be given them to submit further representations on the new evidence. Whether this would be done by way of reconvening the hearing or asking for written submissions from the interested parties, is a matter which would be decided by the Commissioner on the circumstances of each case.[289]

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[285] L.L. Brown, Registrar, Indian Affairs Branch, to Shumiatcher, McLeod & Neuman, Barristers and Solicitors, June 22, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 738–39).

[286] L.L. Brown, Registrar, Indian Affairs Branch, to Shumiatcher, McLeod & Neuman, Barristers and Solicitors, June 22, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 739).

[287] Shumiatcher, McLeod & Neuman, Barristers and Solicitors, to L.L. Brown, Registrar, Indian Affairs Branch, June 28, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 742–43).

[288] L.L. Brown, Superintendent, Reserves and Trusts, memorandum to W.M. Cory, Legal Advisor, July 23, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 740–41).

[289] L.L. Brown, Superintendent, Reserves and Trusts, to Mssrs. Shumiatcher, McLeod & Neuman, Barristers and Solicitors, Regina, August 18, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 748).

Shumiatcher reiterated that all evidence to be laid before the Commission should also be provided to the parties so that they could review the materials.[290]

Meanwhile, during the flurry of correspondence between the department and the counsel for the protestors, the Trelenberg Inquiry resumed on July 2, 1954, and heard evidence from: Albert Miles, the former farming instructor of the Peepeekisis reserve; Fred Dieter, a protested member who previously testified in May; and Campbell Swanson, a protested member who was unable to testify in May.[291] On July 30, 1954, Trelenberg submitted his findings to the department and attached all the documents that had been delivered to him by McCrimmon, along with six copies of the hearing transcripts.[292] Trelenberg's findings supported those who claimed to have been brought into the Peepeekisis Band by a vote of the members, contrary to the assertions of Ernest Goforth:

> In my mind there is no doubt that Ernest Goforth is the leader and the instigator of these protests and to me it appears strange that he should have placed himself in this position and strange that he should state emphatically that no meetings were called or votes taken to admit new members brought in by Mr. Graham when he himself admits, and the fact is corroborated, that he was away from the reserve and attending school from about 1903 to 1909, the period during which the protested claim to have been admitted.[293]

Trelenberg dismissed the testimony of Edwin Nokusis since he "was not on the Reserve during the pertinent period, he could not know of his own knowledge whether or not meeting [sic] were called and votes taken."[294] Trelenberg also stated that Charlie Koochicum was a "quiet, reserved sort of individual and took little or not [sic] part in the activities on the reserve" and for this fact would not have known "what was going on."[295] Trelenberg indicated that the membership status of those admitted to the band under the Fifty Pupil Agreement depended on the legality of the agreement and was subject to their status as Indians.[296] Trelenberg also dismissed the protest against Ernest Goforth's membership, regarding the protested members' reasons as "a matter of spite"and noting that their legal counsel, M.L. Tallant, had refused to act for them in this matter.[297]

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[290] Shumiatcher, McLeod & Neuman, Barristers and Solicitors, Regina, to L.L. Brown, Superintendent, Reserves and Trusts, Indian Affairs Branch, Ottawa, August 25, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 749).

[291] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, vol. III (ICC Exhibit 6A, pp. 275–317).

[292] Leo Trelenberg to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 744–47).

[293] Leo Trelenberg, Melville, SK, to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 746).

[294] Leo Trelenberg to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 745).

Although Trelenberg viewed most of the protestors' testimony during the inquiry as contradictory and one of the reasons for dismissing their protests, Archie Nokusis remarked in the community session: "Well the hearings in Lorlie, the people that were supposed to have been questioned, they all came up with the same story that they were – they had a meeting and were voted in by the people...."[298]

According to his sons, Ernest Goforth also received threats against his life and safety, and they had to protect him on more than one occasion from physical and verbal abuse.[299] Don Koochicum noted that the "feelings were so bad" during this time period that he witnessed an attempt by a colonist to contaminate his family's water source.[300] Elizabeth McKay, however, noted that, once the inquiry was finished, "[e]verything was quiet. It was peaceful. Everything calmed down. That was never spoken about after that."[301] This statement contradicts the evidence of Don

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[295] Leo Trelenberg to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 745).

[296] Leo Trelenberg to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 746).

[297] Leo Trelenberg to the Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 747).

[298] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 344, Archie Nokusis).

[299] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 382, Aubrey Goforth; pp. 383–84, Glen Goforth).

[300] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, 279–82, Don Koochicum.)

[301] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 142–43, Elizabeth McKay).

Koochicum, who testified that during the 1970s his tractors were vandalized and "his equipment destroyed, like fencing equipment and everything, wiring and pickets and everything like that."[302]

Bethune Advisory Committee on Band Membership, 1955

The uncertainty in the wake of the Trelenberg Inquiry prompted the protested members of Peepeekisis Band to hold a meeting on January 14, 1955, and petition the government for information regarding "the progress of having our status reassured to our former legality."[303] They also questioned the reasoning behind the continued freezing of the band's finances since "band funds can be used for public works, but cannot be used for individual living needs. Why public needs before human needs?"[304]

Later that month, an Advisory Committee of senior departmental officials, appointed to review Commissioner Trelenberg's findings, presented its report and recommendations to the Registrar in two separate memoranda. The committee was comprised of W.C. Bethune, Membership and Estates; W.M. Cory, Legal Advisor; and Malcolm McCrimmon, Chief of the Statistics and Membership Division.[305] In the second memorandum, dated January 24, the committee recommended that the memberships of Ernest Goforth, Celina Desnomie, and Alex Desnomie be confirmed.[306]

The first memorandum, dated January 21, addressed the other 23 membership protests. Owing to "conflicting evidence and inability to determine what is correct in many instances," the committee reported:

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[302] ICC Transcript, September 11-12, 2002 (ICC Exhibit 5A, p. 283, Don Koochicum).

[303] Chief and Council, File Hills Indian Colony, Peepeekisis Reserve, to J.W. Pickersgill, SGIA, January 18, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 752).

[304] Note to file, summary of Peepeekisis meeting held January 14, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 750).

[305] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, Ottawa, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 757); and W.C. Bethune, Membership and Estates, to the Director, January 24, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 763).

[306] W.C. Bethune, memorandum to the Director, January 24, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 763).

> Departmental records do not establish beyond doubt that in any one case the newcomer was brought into band membership by the authority of the Superintendent General as authorized by the 1887 amendment. In dealing with individual cases the legality of the admissions would be difficult, if not impossible, to establish. On the other hand it can be argued with some soundness that admission was pursuant to the amendment of 1887 or 1895. It has not been established through the public inquiry or by examination of departmental records that admissions did not conform with the Act.[107]

The committee, however, did conclusively find:

> Our records fail to show that Mr. Graham and the Indian Affairs Department did comply fully with the requirements of the Indian Act in regard to the admission of newcomers to the Peepeekeesis Band. Evidence supports the view that the individuals were brought into membership in the Peepeekeesis Band
>
> (1) without a vote as required by the 1895 legislation, and as time went on
> (2) with a vote of some original members supported by newcomers, and then
> (3) with a vote of only "newcomers."[108]
>
> Three alternatives were proposed:
>
> (1) It could be decided that the protests should be allowed, on the basis: of the reputation Mr. Graham established for himself, which lends support to opinions expressed at the public hearing that he used forms of bribery or threat and disregarded the provisions of the Indian Act in the matter of admissions to band membership; and lack of proof that admissions to the Peepeekeesis Band followed a majority vote of the band or decision of the Superintendent General of Indian Affairs based on inquiry by a person specially appointed by him to make such inquiry. Such decision would result in the removal from band membership of 90% of the Indians now on the Peepeekeesis list. Some of them have been on the reserve for over fifty years, and many were born there. These Indians comprise the more progressive element. They have made substantial improvements, and section 23 of the present Act provides for compensation to Indians for permanent improvements when such Indians are lawfully removed from a reserve. The intention has been that in cases where Indians are removed from Band membership as a result of protest,

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[107] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 753, 755).

[108] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 754–55).

improvements left behind would be paid for out of Parliamentary Appropriations. In addition to cost, many of these people would be removed from the area that has constituted their home from birth. The value of the improvements would probably be a loss and the Department would be faced with the problem of re-establishment elsewhere. Your Committee is not prepared to recommend this action, except in one case.

(2) It could be decided that the protests, with the exception referred to above, should be disallowed on the basis that it has not been established [that] admissions to membership did not conform with the requirements of the Act. There are on file consents to transfer and while they contain the names of "newcomers" rather than old timers, as a rule, voting was by a showing of hands and the forms themselves might not reveal how the voting went. In years prior to and following the time treaty was signed, inter-relationship of Indians and rather loose composition of bands doubtless resulted in informal practices in accepting new members into membership. With the exception already referred to, there is insufficient evidence to rule that the persons protested are non-Indian. There is a basis for disallowance, but such a decision would in all likelihood be appealed and the matter would remain unsettled if the Registrar's decision was sustained. Furthermore, the finding would not be an equitable one.

(3) An effort could be made to reach a compromise settlement with the original Peepeekeesis Band members and the so-called "newcomers". Such agreement might involve:

(a) A division of the reserve so as to leave to the original members and their descendants the area now occupied by them, and to the newcomers the sub-divided portion which is now occupied by them.

(b) Constituting a new band to compromise [sic] the "newcomers", and

(c) the retention by the original group of band funds approximating $35,000.00.

There is reason to believe that the original band members and their descendants might accept such a solution if, in addition to retaining their band funds, they were compensated through appropriation with a cash settlement. This Committee is convinced that a decision in accord with (1) or (2) would result in an appeal, and whatever the decision was on the appeal it would not settle the matter. Furthermore, we are of the opinion that while the objectives and results of the File Hills colony scheme were good in themselves, the methods adopted by Mr. Graham and the Department of Indian Affairs were high handed and showed a disregard for the Indian Act and the fact that the lands were set aside for the Peepeekeesis Band of Indians alone. The scheme resulted in the best lands in the reserve being made

> available to other Indians contrary to the provisions of the treaty as interpreted by legislation.[309]

The Advisory Committee suggested that the matter be referred to the Deputy Minister, with the recommendation that an agreement between the two groups on the reserve be negotiated and that consideration be given to the "payment of reasonable compensation to the descendants of the original members of the Band."[310] The committee noted that 19,000 acres were occupied by the "newcomers" and proposed that "original members and their descendants" be compensated $3 to $5 per acre as this was the price charged for pre-emption or purchased homestead lands.[311]

In the end, whatever decision the government took, the committee reasoned it would likely lead to "expensive litigation – either by way of appeals should the newcomers be taken into membership, or by appeals and claims for compensation should the appeals be disallowed."[312]

Negotiations for Compensation, 1955–56

On January 25, 1955, Ernest Goforth wrote the branch to protest the recent election of a new Chief and Council and to propose the negotiation of a compromise regarding the membership issue.[313] H.M. Jones, Director of Indian Affairs, replied that the election matter would be looked into and that Goforth's suggestion about negotiating a compromise settlement would "receive very thoughtful consideration."[314] Shortly afterwards, Jones submitted a memorandum to the Deputy Minister, informing him that the Advisory Committee deemed that $60,000 to $100,000 would have to be paid in compensation.[315] "I do not think," he added, "we should try to go below the minimum figure because the Government should not endeavour to reach less than a fair settlement." He also noted Goforth's invitation to negotiate a compromise.[316]

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[309] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, Ottawa, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 755–57).

[310] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 757).

[311] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 757).

[312] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 755).

[313] Ernest Goforth to H.M. Jones, Director of Indian Affairs, January 25, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 764–68).

[314] H.M. Jones, Director, Ottawa, to Ernest Goforth, Balcarres, SK, February 2, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 770).

Throughout the winter and spring of 1955, both the "protested" and the "protestors" petitioned the branch for a resolution of the matter.[317] The branch indicated, however, that it was still awaiting other commission reports on band membership from across the country to be completed before taking any decisions.[318]

On January 4, 1956, a meeting was held in Regina between Ernest Goforth, M.C. Shumiatcher, counsel for the protestors, and members of the Indian Affairs Branch. In his letter to E.S. Jones and M. McCrimmon of the following day, Shumiatcher first indicated that the letter was written on a "without prejudice basis" to the rights of the parties protesting and in no way could be construed as a departure from the protestors' position that those protested did not have any right to membership in the Peepeekisis Band.[319] According to Shumiatcher, McCrimmon had suggested at the meeting that, if the protestors were to submit a money figure to the branch and if they were to withdraw their objections upon payment of that amount, "'something very tangible would be done to improve the housing and welfare of the Indians of the Band.'"[320] Schumiatcher also indicated that McCrimmon proposed the surrender of a large part of the Band's reserve land to the Crown "for the use of the non-members" in exchange for $60,000.[321] He concluded, however, that his clients could not accept such an offer as "[t]here are too many facts which have not yet been disclosed by the Department upon which any settlement must be based ..." McCrimmon's memorandum to W.C. Bethune, submitted with Shumiatcher's letter on January 10, 1956, stated:

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[315] H.M. Jones, Director, memorandum to the Deputy Minister, February 2, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 771).

[316] H.M. Jones, Director, Ottawa, memorandum to the Deputy Minister, February 2, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 772).

[317] See Chief and Council, File Hills Indian Colony, Peepeekisis Reserve, to J.W. Pickersgill, SGIA, January 18, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 752); H.M. Jones, Director, to Joe Ironquil, January 27, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 769); Ernest Goforth to H.M. Jones, Director, Indian Affairs Branch, February 14, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 773–76); H.M. Jones, Director, to Joe Ironquil, March 15, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 777–79).

[318] Registrar, Indian Affairs Branch, Ottawa, to Shumiatcher, McLeod, Neuman & Pierce, Barristers and Solicitors, April 7, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 781).

[319] M.C. Shumiatcher, Shumiatcher & McLeod to M. McCrimmon, Registrar for Commission of Inquiry into Membership of Indian Bands, and E.S. Jones, Regional Supervisor, Indian Affairs Branch, January 5, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 782).

> After some discussion, the question of surrendering all the subdivided portion of the Reserve, comprising 19,488 acres, was considered. Mr. Shumiatcher asked me what the Branch would pay for the acreage involved and I made it clear to him that I was not in a position to negotiate for this land. Furthermore, I stated that I was not admitting that the protestors had any claim against the Branch, but that if a surrender of the subdivided portion would end once and for all the controversy over membership, I would be prepared to recommend to the Branch that they pay the original members $3.00 per acre, the equivalent of the price paid for pre-emption land in this district at the time the agreement of 1911 was negotiated. This explains his reference to the $60,000 in his submission. He replied that the Indians would expect payment of a few hundred thousand dollars. After considerable discussion he agreed to submit a written proposal as to the terms the original band members would accept. His submission is on file hereunder.[322]

McCrimmon concluded that at least $500,000 would be required to settle the matter based upon the terms proposed by Shumiatcher.[323]

On January 11, 1956, H.M. Jones, Acting Deputy Minister of Indian Affairs, reviewed both Shumiatcher's letter and McCrimmon's memorandum and reported to John Pickersgill, the Minister:

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[320] M.C. Shumiatcher, Shumiatcher & McLeod to M. McCrimmon, Registrar for Commission of Inquiry into Membership of Indian Bands, and E.S. Jones, Regional Supervisor, Indian Affairs Branch, January 5, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 783).

[321] M.C. Shumiatcher, Shumiatcher & McLeod, Barristers and Solicitors to M. McCrimmon, Registrar for Commission of Inquiry into Membership of Indian Bands, and E.S. Jones, Regional Supervisor, Indian Affairs Branch, January 5, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 783).

[322] M. McCrimmon, Registrar, Indian Affairs Branch, to W. Bethune, January 10, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, pp. 786–87).

[323] M. McCrimmon, Registrar [for the Commission of Inquiry into Membership of Indian Bands], Indian Affairs Branch, to W. Bethune, January 10, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 787).

> As I think you are aware, a rather peculiar membership protest situation exists at the Peepeekeesis Reserve near Lorlie, Saskatchewan. It arises from the fact that a former senior official of the Indian Department promoted a scheme, known as the File Hills colony, for the establishment in farming of graduates of Indian Residential Schools. As a settlement scheme, it was reasonably successful, but I am afraid that the provisions of the Act with respect to the transfer of Indians from one Band to another may have been given scant consideration.
>
> Having this in mind, it was thought that an effort should be made to reach some compromise settlement with the descendants of the original members ...
>
> It will be apparent from Mr. McCrimmon's report and the accompanying copy of a letter written by Mr. M.C. Shumiatcher, Barrister of Regina, that there is little hope of a reasonable settlement. Therefore, it is felt that decisions on the individual protests should now be given by the Registrar, and the cases allowed to reach the appeal stage where final decisions will be given by the reviewing judge. It is altogether likely that whatever decisions were reached by the Registrar, there would be appeals. If this procedure meets with your approval, each case will be reviewed carefully, although from the previous review, it is probable that the decisions will result in twenty-five being declared entitled to membership in the Band, and one not entitled to membership.
>
> The question of compensation, if any, would have to be determined at a later date, probably by legal process.[324]

Judge McFadden's Review of Band Memberships, 1956

The course of action suggested by the Acting Deputy Minister in January was apparently approved. On February 2, 1956, W.C. Bethune wrote a memorandum to H.M. Jones and recommended that all the protested members be included in the membership of the Peepeekisis Band except Albert Daniels and Campbell Swanson, who required further consideration.[325] Jones's memorandum to the Deputy Minister on March 13, 1956, stated that Swanson's fate was considered by the Registrar on February 10, 1956, and he ruled that Swanson be struck from the membership rolls because "his ancestors were of non-Indian status."[326] Jones also stated that N.J. McLeod, Superintendent of the

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[324] Acting Deputy Minister, Department of Citizenship and Immigration, to the Minister, Department of Citizenship and Immigration, January 11, 1956, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, pp. 788-89).

[325] W.C. Bethune, Acting Superintendent, Reserves and Trusts, to the Director, February 2, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 792).

[326] H.M. Jones, Director of Citizenship and Immigration, Indian Affairs Branch, memorandum to the Deputy Minister, March 13, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 793).

File Hills-Qu'Appelle Agency, had asked about the status of Margaret Swanson, widow of Marion Swanson, and her two children who resided on the reserve.[327] Jones recommended that Margaret Swanson and her family stay on the membership rolls because "they were not protested" previously; he also stated that requests for a judicial review of the Registrar's decisions would expire on May 10, 1956.[328]

On March 15, 1956, Ernest Goforth informed the branch that he was appealing the Registrar's decision made in favour of the 23 protested members.[329] In April, Georgina Kootawa (Shave Tail) repeated the request for a review,[330] and in May, the protestors' legal counsel also requested the review.[331] Meanwhile, the File Hills Colony members sent a petition appealing the decision regarding Campbell Swanson, asking that he not be displaced from the membership into which he had been born.[332]

On May 7, 1956, Ernest Goforth wrote to H.M. Jones asking the department for an allotment of band funds to pay for legal fees and stated that $24,000 had already been taken out of the band account to pay for the legal fees of the protested members over the previous five years.[333]

In September 1956, both H.M. Jones and W.C. Bethune recommended that the branch consider the appointment of counsel "to ensure that the Department's case is adequately presented to the Judge"[334] and to "take care of the Branch interests."[335] The Deputy Minister wrote in a marginal note on Jones's memorandum that "[t]he question of protest is a matter between Indians and we should not interfere. The Branch should not be a party for or against, although we should assist by producing documents, etc. when required. I consulted with the Minister who agrees with this decision."[336]

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[327] H.M. Jones, Director of Citizenship and Immigration, Indian Affairs Branch, to the Deputy Minister, March 13, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 793).

[328] H.M. Jones, Director of Citizenship and Immigration, Indian Affairs Branch, to the Deputy Minister, March 13, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 794).

[329] Ernest Goforth to J.W. Pickersgill, SGIA, March 15, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 797).

[330] Georgina Kootawa (Shave Tail) to M. McCrimmon, Registrar, Indian Affairs Branch, Department of Citizenship and Immigration, April 26, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 800.)

[331] Shumiatcher, Moss & Lavery, Barristers and Solicitors, to the Registrar, Indian Affairs Branch, May 1, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 802).

[332] Members of File Hills Indian Colony, Peepeekisis Reserve, to unidentifed recipient, April 1956, no file reference available (ICC Exhibit 1, pp. 798–99).

[333] Ernest Goforth to H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, May 7, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 805).

In both of the above-mentioned memoranda, the authors indicated that Ernest Goforth had again approached McCrimmon asking him to consider the department's offer made in Regina in January; however, since notices of appeal had already been filed by the protestors and since Judge J.H. McFadden had been appointed to review McCrimmon's decision, negotiations could not be discussed.[337] McFadden's review was to examine the membership protests at both the Peepeekisis Band and the Okanese Band.

On October 1, Goforth wrote to the branch requesting that the review be postponed for two reasons: he had been injured, and it was difficult for him to raise the $500 needed for legal fees because band members were "scattered" throughout other communities. He again reiterated his openness to "compromise on the offer made by the Department on January 4, 1956 at Regina."[338] In a letter dated October 3, Jones repeated the branch's stance that it was too late for a settlement and questioned Goforth's legal authority to rescind the protestors' request for an appeal since the branch had been in touch with the protestors' lawyer.[339] That same day, Judge McFadden wired the branch indicating that the Peepeekisis protestors no longer had legal counsel owing to their inability to pay the fees and suggested that the branch hire Mr Lavery, of Shumiatcher, Moss and Lavery, to represent the Peepeekisis protestors because he was familiar with their case and was already acting for the Okanese Band.[340] The branch replied that it had never paid the legal fees for either side in membership protests because these were "disputes between Indians" and that McCrimmon would be available to provide factual information.[341]

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[334] H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, to the Deputy Minister, September 5, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 812).

[335] W.C. Bethune, Superintendent, Reserves and Trusts, to H.M Jones, Director of Indian Affairs Branch, Department of Citizenship and Immigration, September 4, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 811)

[336] H.M Jones, Director of Indian Affairs, Ottawa, to the Deputy Minister, September 5, 1956, with marginal note by the Deputy Minister, dated September 7, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 813).

[337] W.C. Bethune, Superintendent, Reserves and Trusts, to H.M Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, September 4, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 810), and H.M Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, to the Deputy Minister, September 5, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 812).

[338] Ernest Goforth to H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 1, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 816).

The hearing lasted from October 9 to 15, 1956, with Ernest Goforth representing the protestors and M.L Tallant representing the protested. On the last day, shortly before concluding, Judge McFadden made the following comments:

> I may say it is going to be a very difficult thing for me to decide this case. I am sure it is going to take me a great deal of time to prepare a decision. I regret that under the Act there is not a Court to review my decision and I regret very much that there is no provision they could go over my head and put me right, if I should be wrong, but apparently it does make some provisions that this Decision shall be final.
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> ...
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> ... If I am wrong in my view of the Law, in interpreting the Act, then there might possibly be a case that Mr. Tallant or you, Mr. Goforth – or perhaps the Department, could have my Decision placed before a Higher Court ...[342]

On December 13, 1956, Judge McFadden provided his decision.[343] In the case of the 18 people and their descendants who were admitted into the Band before 1911, Judge McFadden found that the Registrar had correctly decided that the records showed they were admitted and that "'it has not been established that requirements of the Indian Act were not complied with.'"[344] Judge McFadden also upheld the Registrar's decision that the five people who were admitted under the 1911 Fifty Pupil Agreement were entitled to band membership, because they had built a life in the Colony on the assumption that the agreement was valid.[345] He overturned the Registrar's decision regarding Campbell Swanson, indicating that the Consent to Transfer form for Campbell's father, Alfred, would indicate that the department would have looked into the allegations that the father was not of aboriginal descent: "Very strong evidence should be required to find the Department negligent in that respect and I cannot see that such evidence is apparent in this case."[346] In the case of Albert Daniels, McFadden also overturned the Registrar's decision, based on a more complex legal set of reasons that he discussed at length.[347]

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[339] H.M. Jones, Director, Ottawa, to Ernest Goforth, Balcarres, SK, October 3, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, pp. 817–18).

[340] Judge J.H. McFadden, to the Indian Affairs Branch, Department of Citizenship and Immigration, October 3, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 819).

[341] H.M. Jones, Director, Indian Affairs Branch to Judge J.H. McFadden, October 3, 1956. NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 820).

[342] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 238, J.H. McFadden).

[343] Decision of Judge J.H. McFadden, "In the matter of The Indian Act, Chapter 149, R.S.C. 1952, and amendments thereto and in the matter of the membership of Alex Desnomie and other parties in the Peepeekeesis Band," December 13, 1956, reproduced as Appendix F.

Judge McFadden confirmed 23 of the protested memberships and reinstated the remaining two.[348] He had more difficulty, however, coming to terms with his jurisdiction to decide on the validity of the 1911 Fifty Pupil Agreement and his decision in that regard:

> If I have jurisdiction in that regard, I am not prepared to say that I consider the agreement to be valid beyond question but I have arrived at the conclusion that it is valid rather than invalid. I further hold that insofar as that 1911 agreement is concerned the protestors or those whom they represent are estopped, as against those protested, from pleading such 1911 agreement as being invalid.[349]

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[344] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, pp. 3–14). These people were Alex Desnomie, Celena Desnomie, Widow Joe McNabb, Widow Joe McKay, Fred Dieter, John Thomas, Ben Stonechild, Roy Keewatin, Mark Ward, William Ward, Norman Keewatin, William Bellegarde, Francis Dumont, Clifford Pinay, Joseph Ironquill, Henry McLeod, Mary Brass, and Magloire Bellegarde.

[345] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, pp. 18–19). These people were Pat LaCree, Moise Bellgearde, David Bird, Noel Pinay, and Prisque LaCree.

[346] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, p. 23).

[347] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, pp. 23–32).

[348] J.H. McFadden to H.M. Jones, Director, Indian Affairs Branch, Ottawa, December 19, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 824).

[349] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, p. 18).

Alleged Offer of Compensation from Canada, 1962

In an affidavit dated May 25, 1984, Ernest Goforth's wife, Margaret Goforth, stated that her husband had received an offer of compensation prior to his death in September 1962.[350] Their sons Aubrey and Glen later gave concurring testimony during the community session in September 2002.[351] Mrs Goforth recounted how, in the first week of September, she and her husband were heading to the school to do janitorial work when he became ill. In her affidavit, Mrs Goforth stated:

> 14. While we were awaiting arrival of the ambulance to take him to the hospital three Indian Affairs officials arrived. Of the three, I recognized Mr. N.J. McLeod and Mr. Jones. The other I believe was from Ottawa. Mr. McLeod was the File Hills Qu'Appelle District Superintendent, IAB and Mr. Jones was the Regional Superintendent, IAB.
> 15. My husband was very sick, yet asked what he could do for them.
> 16. They said they came to make a settlement on the membership issue. They proceeded to read the terms from the papers they brought with them.
> 17. To each original member two hundred dollars were to be given, and to each family originally of the band a new house, that is eight new homes in all. To each of those original families, farm implements and stock. The houses were to be built on the unsubdivided section of the Peepeekisis Reserve, preferably clustered in one location. The total cost of this settlement would be sixty-two thousand dollars.
> 18. My husband told them he would have to call those original members together to consider those terms of settlement. This the officials agreed to. Unfortunately my husband died a few days later.[352]

Elwood Pinay testified that Goforth received an offer of $60,000 and eight new houses for the protestors, but that Goforth turned down this offer "at the time of the – when he was ill" and that he did so "because he didn't want to share this money with his original protestors."[353] Stewart Koochicum, Ernest Goforth's nephew, also said that the offer "was turned down" by his uncle, but made no allegation similar to Pinay's. Koochicum added that his uncle said he would have to take it to the people first.[354] According to Mrs Goforth and the sons, however, Goforth never refused the offer. Aubrey Goforth stated that he read the letter from the department and that he saw the women in his family reacting with joy that they would finally be compensated.[355] Margaret Goforth stated, however, that "nothing was ever done to follow-up this settlement" and that eventually she divided her husband's papers between her sons Aubrey and Glen, but many of the papers were destroyed when Glen's house burned down.[356]

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[350] Affidavit of Margaret Goforth, Peepeekisis Reserve, May 25, 1984 (ICC Exhibit 2A, p. 66).

[351] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 389–91, Aubrey and Glen Goforth).

[352] Affidavit of Margaret Goforth, Peepeekisis Reserve, May 25, 1984 (ICC Exhibit 2A, p. 66).

[353] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 216, Elwood Pinay).

Peepeekisis Specific Claim, 1986–2001

In 1978, the Federation of Saskatchewan Indians obtained a copy of Judge McFadden's decision.[357] Eight years later, in 1986, the Peepeekisis Band submitted a specific claim to the Department of Indian Affairs and Northern Development, alleging that

> the actions of the Department of Indian Affairs and its agents, which resulted in the colonization and subdivision of our reserve, the consequent diminishment and alienation of this land and the "Pauperization of the Original Band Members", as a result of the negligent and improper administration of our land, was a breach of the Crowns fiduciary obligations to act in our best interests.[358]

In April 2001, after receiving the Peepeekisis First Nation's request, the Indian Claims Commission agreed to conduct an inquiry into its claim. In September 2001, the panel found that it had the jurisdiction to conduct this inquiry on the grounds that Canada's breach of its numerous commitments and its inordinate delay in responding to the claim constituted a rejection of the claim.

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[354] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 295–96, Stewart Koochicum).

[355] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 370–71, Aubrey Goforth).

[356] Affidavit of Margaret Goforth, Peepeekisis Reserve, May 25, 1984 (ICC Exhibit 2A, p. 66). See also ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 389–91, Glen Goforth).

[357] H.H. Chapman, Registrar, Department of Indian and Northern Affairs, Ottawa, to David Langille, Federation of Saskatchewan Indians, Regina, March 7, 1978, file reference unavailable (ICC Exhibit 1, p. 825).

[358] Enock J. Poitras, Chief, Peepeekisis Indian Band, Balcarres, SK, to David Crombie, Minister of Indian Affairs and Northern Development, Ottawa, April 18, 1986, file reference unavailable (ICC Exhibit 1, pp. 826–27).

PART III

ISSUES

The Indian Claims Commission is inquiring into the following four issues:

1 Has Canada breached a lawful obligation to the Peepeekisis First Nation in respect of Canada's decision to undertake and implement what is described as the File Hills Colonization Scheme?

2 If the answer to question 1 is in the affirmative, the following additional questions should be posed:

   a) What is the nature of the breach or breaches?
   b) What are the appropriate criteria to compensate the Peepeekisis First Nation and its members for the breach or breaches?

3 If the answer to question 1 is in the negative, do Canada's actions give rise to a claim under the heading "Beyond Lawful Obligations," as outlined in the Native Claims Policy?

4 If the answer to question 3 is in the affirmative, what would be appropriate criteria to compensate the Peepeekisis First Nation and its members?

PART IV

ANALYSIS

INTRODUCTION

The analysis begins with the Crown's decision to create a farm colonization Scheme on the Peepeekisis First Nation reserve. The panel considers that this decision demands close scrutiny in order to determine whether the Crown breached a lawful obligation to the First Nation. The panel will therefore examine the terms of Treaty 4, the legislative requirements of the *Indian Act*, and the fiduciary obligation, if any, owed to the First Nation over the decision to place a farming Colony on its reserve.

The panel will also analyze the various steps the Crown took to implement the colonization Scheme on the Peepeekisis reserve. The Crown implemented its decision through a number of different actions, each of which will require the panel to ask if the Crown breached a lawful obligation – under treaty, the *Indian Act*, or a fiduciary obligation – to the First Nation. These separate acts can be described as (1) the placement on the reserve of industrial school graduates who were not members of the Peepeekisis Band; (2) the subdivision of the reserve into farming plots; (3) the allocation of those farming plots to graduates; (4) special assistance to the industrial school graduates; and (5) the transfer of the memberships of those graduates, or ex-pupils, from their former bands to the Peepeekisis Band.

The First Nation argues that the Crown's decision to create the Scheme, and its actions in implementing it, constituted breaches of lawful obligation to the First Nation. In response, Canada raises the defence of *res judicata* – that the matter was already decided and cannot be re-examined by the ICC – stemming from the 1956 decision of Judge J.H. McFadden of the district court of the Judicial District of Melville, Saskatchewan. The panel will discuss this defence in the analysis of the transfer of memberships for the graduates; first, as a defence to the question of the validity of the membership transfers; second, as a defence to the Crown's conduct in obtaining the membership transfers; and, finally, as Canada's defence to the entire claim.

Canada has also made alternative arguments in answer to the First Nation's submissions regarding the Crown's lawful obligations under Treaty 4, the *Indian Act*, and the fiduciary relationship. We turn, therefore, to the parties' claims and defences as they relate to these matters before addressing Canada's defence of *res judicata*.

CHARACTERIZATION OF THE FILE HILLS SCHEME

A review of the record reveals that the File Hills Scheme has been referred to by many different names. It has been called an "experiment," a "colony system,"[359] the "school-boy colony,"[360] "Graham's system,"[361] the "ex-pupil colony,"[362] a "settlement scheme,"[363] and, most often, the "File Hills Colony."[364] In their legal submissions, the parties each put forward their own characterization of the events in question. The First Nation's submissions describe the events as "a unique 'experiment' in Canadian history,"[365] one that included the allocation, survey, and subdivision of Peepeekisis reserve lands for the benefit of "colonists"; the transfer of membership of the "colonists"; and the separation of the "colonists" from the "*original* band members." In its written reply submissions, the First Nation articulated its view of the events in question:

> What the Commission is called upon to consider in the present case is Graham's Scheme to bring non-band members onto the Peepeekisis Reserve in order to establish them in farming operations and the dispossession of existing band members

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[359] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[360] W.M. Graham, Indian Agent, Qu'Appelle Agency, to the SGIA, August 17, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 186 (ICC Exhibit 1, p. 397).

[361] Kate Gillespie, Principal, File Hills Boarding School, to the SGIA, August 30, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 346 (ICC Exhibit 1, p. 414).

[362] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to Frank Pedley, DSGIA, August 1, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 149 (ICC Exhibit 1, p. 442).

[363] Acting Deputy Minister of Indian Affairs to the Minister of Indian Affairs, January 11, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 788).

[364] David Laird, Indian Commissioner, to Frank Pedley, DSGIA, October 14, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 194 (ICC Exhibit 1, p. 455). See also Acting Deputy Minister of Indian Affairs to the Minister of Indian Affairs, January 11, 1956, NA, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 788).

[365] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 163.

> from those lands. The evidence is clear that Graham assumed significant control over the Peepeekisis Band. By bringing non-band members onto the Reserve and allocating land to them, the original band members were deprived of the use of those lands and, as the families of the individuals transferred to the reserve became larger, the problem became greater and greater.
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> ...
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> While the overall impact of admitting a few members to a band may not have a significant impact on the distribution of resources, in a case where existing band members are to be outnumbered, the Scheme effectively changed "the band" and has substituted a different entity from that which entered treaty.[366]

Canada, in its written submissions, expressed a somewhat different view of these events:

> In accordance with its agrarian policy for Indian Bands, around the turn of the last century, Canada implemented a project on Peepeekisis I.R. 81 to establish graduates of residential and industrial schools as progressive farmers. The reserve was subdivided and graduates were located on plots for farming, pursuant to the *Indian Act*. The graduates came largely from other bands and were admitted into membership of the Peepeekisis Band with the consent of the band on an individual basis until 1911, and thereafter by way of an Agreement between Canada and the Peepeekisis Band to admit 50 further graduates.[367]

The File Hills Scheme can be seen as a totality of two important steps: the decision to *undertake* the Scheme on the Peepeekisis reserve and the methods to *implement* it. Essentially, there were five stages in implementing the Scheme: the placement of non-band members on the reserve; the subdivision of the reserve into farming plots; the allocation of these farming plots to the industrial school graduates; financial assistance to the graduates; and the transfer of memberships of the graduates into the Peepeekisis Band.

The Commission considers that the File Hills Scheme, although undertaken and implemented with the encouragement and support of senior officials, was inextricably linked to the arrival of William Morris Graham in 1896 and the duration of his authority as Indian Agent, Inspector of Indian Agencies, and Indian Commissioner. We find that the File Hills Scheme had its beginnings by early 1898, with the arrival and formal transfer of Qu'Appelle Industrial School graduate Joseph

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[366] Written Submission on Behalf of the Peepeekisis First Nation, January 13, 2003, paras. 73 and 74.

[367] Written Submission on Behalf of the Government of Canada, December 23, 2002, p. 1.

McNabb into the Peepeekisis Band and his establishment in a farming operation. The Scheme was not begun at the initiative of the Peepeekisis Band; as the First Nation points out, the creation of a farming colony on the reserve would have been "inconsistent with the beliefs of traditional members of the First Nation."[368] Rather, the government's objective in creating the File Hills Colony was, as described by Canada's counsel, to provide "an example of the potential success of Canada's policy at that time which was to 'civilize,' 'assimilate' Aboriginal peoples, the idea being that they would become part of mainstream society through this process."[369]

Canada acknowledges that it was Graham who first planned to put industrial school graduates on the Peepeekisis reserve, pointing to his 1898 and 1899 reports which indicated that five graduates were already situated on the reserve.[370] There is no evidence on the record to indicate that the Department of Indian Affairs had a formal policy in 1898 to establish farming colonies, and no evidence of similar schemes taking root on other reserves in Canada. It is clear, however, that the department welcomed the idea of helping industrial school graduates to become self-sufficient farmers, as part of its policy of encouraging Indian people to adopt agriculture as a way of life. Between 1898 and 1902, officials did not appear to question Graham's actions, even in light of the sudden, unexplained increase in the number of Consents to Transfer memberships into the Peepeekisis Band that were coming forward. By 1902, however, when "fifteen ex-pupil lads" had been brought onto the reserve to farm, Indian Commissioner David Laird confirmed that "the department has authorized an experiment to be made of the colony system," identifying by name the File Hills Colony as a "fairly successful" example.[371] We agree with the First Nation that, by 1902, if not before,"the scheme itself had clearly been approved at a level above Graham."[372]

The government could have chosen to set up separate reserves for the industrial school graduates but, according to Laird, did not do so for financial reasons: "The method adopted does not involve the expense of setting apart separate reserves for ex-pupils."[373] Instead, the government preferred to select "a portion of some of the larger and more fertile reserves" that were at a safe distance from the less progressive Indian settlements, yet close to the farming instructor and the Indian Agent.[374] The Peepeekisis reserve seemed to meet all these requirements and more. The populations of the four contiguous File Hill Bands – Peepeekisis, Star Blanket, Okanese, and Little Black Bear – had declined and, according to Inspector T.P. Wadsworth's 1891 report,[375] the four bands were pooling their farm labour and proceeds to sustain themselves. In addition, some of the File Hills children were already at the Qu'Appelle Industrial School or had graduated and were starting to farm. Thus, the Peepeekisis reserve, the site with the most fertile agricultural land within the File Hills reserves, was an obvious choice for such an experiment. The government's decision to locate the Colony on an established reserve for financial reasons would prove, however, to have dramatic consequences for the First Nation.

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[368] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 133.

[369] ICC Transcript, April 3, 2003, pp. 97–98 (Uzma Ihsanullah).

[370] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 4.

[371] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[372] ICC Transcript, April 3, 2003, p. 25 (Thomas Waller, QC).

THE CROWN'S DECISION TO UNDERTAKE THE SCHEME AT PEEPEEKISIS

This section addresses the question whether the Crown's initial decision to undertake the File Hills Scheme on the Peepeekisis reserve was in breach of Treaty 4, the *Indian Act*, or the Crown's fiduciary obligation, if any, to the Peepeekisis Band.

Did the Decision to Undertake the Scheme Comply with Treaty 4?

The mandate of the Indian Claims Commission includes the authority to examine whether the Crown's actions have resulted in non-fulfilment of the applicable treaty. Treaty 4 provides in part:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference

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[373] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[374] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[375] T.P. Wadsworth, Inspector of Indian Agencies, to the Indian Commissioner, December 21, 1891, NA, RG 10, vol. 3859, file 82250-7 (ICC Exhibit 1, p. 120).

> with each band of the Indians, and *to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families*; provided, however, that it be understood that, if at the time of selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, *so as not to diminish the extent of land allotted to the Indians*; and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, *may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained*, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.
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> ...
>
> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, *all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians*.[376]

Both parties have enumerated the principles of treaty interpretation that should guide the panel in determining whether the Crown breached its lawful obligation to the Peepeekisis First Nation. Of the principles summarized in *R. v. Marshall* and relied on by the First Nation, the five following are of particular significance in this claim: the words of the treaty are to be given the sense they would naturally have held for the parties at the time; the treaty should be liberally construed, and any ambiguities resolved in favour of the aboriginal signatory; the terms of the treaty cannot be altered by exceeding what is realistic or possible, given the language; the goal is to choose from among the possible interpretations of common intention the one that best reconciles the interests of both parties at the time the treaty was signed; and the honour of the Crown is always at stake in its dealings with aboriginal people.[377] The Commission has relied on a number of these principles in previous reports.[378]

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[376] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Exhibit 8). Emphasis added.

Canada points out that the First Nation did not raise any arguments surrounding the negotiation of Treaty 4 that could have resulted in oral terms or a common understanding that did not form part of the written text of Treaty 4.[379] We agree that this is not a situation where the panel must reconcile various possible interpretations of the common intention of Treaty 4; instead, the panel will consider the plain words of the treaty itself.

First, the words of Treaty 4 referring to the grant of agricultural implements reflect one of the objectives of setting aside reserve lands under the treaty – to encourage the signatory bands to take up agriculture as a way of life, given, as Canada says, the increase in the settler population and the decline of the buffalo.[380] The First Nation characterizes this purpose more generally as providing "an economic base or opportunity for the First Nation, both as a collective and for its constituent members."[381] The idea, in principle, of developing initiatives to boost the economic self-sufficiency of a band through the promotion of agriculture would appear to be consistent with the words of the treaty.

Second, the land allotted to the Peepeekisis Band, according to the treaty, was to be "of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families."[382] In that context, we consider that the words of the treaty dealing with settlers who may be present on land when it is set aside for the Peepeekisis reserve, while not on point, are indicative of the principle that the acreage of the reserve land should not be diminished by third parties: "Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians."[383] In essence, the Crown promised that the Peepeekisis land base would not be diminished by permitting non-band individuals to reside there. By analogy, the same principle can be applied to a situation in which the Crown, in furtherance of a scheme to encourage farming by Indians, placed Indian industrial school graduates from other bands on Peepeekisis reserve land.

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[377] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 61, outlining certain principles of treaty interpretation established by Supreme Court of Canada decisions, as summarized by Chief Justice McLachlin, dissenting for other reasons, in *R. v. Marshall*, [1999] 3 SCR 456 at para. 78.

[378] See, for example, ICC, *Carry the Kettle First Nation Inquiry Cypress Hills Claim* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 300–1; ICC, *Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 162; and ICC, *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 74–75.

[379] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 85.

[380] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 87.

[381] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 68.

[382] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Exhibit 8, p. 5).

Third, the wording of the treaty specifically provides that "the aforesaid reserves of land, or any part thereof, or any interest or right therein, or any appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained."[384] On the facts of the Peepeekisis claim, there was no "sale" or "lease" entered into with the graduates who took up residence in the Colony and who eventually transferred membership into Peepeekisis. Nevertheless, it is relevant to ask whether the creation of the File Hills Scheme necessitated a "disposition" of Peepeekisis lands.

According to *Black's Law Dictionary*, a "disposition" means "the act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property."[385] Furthermore, according to *Roget's Thesaurus*,[386] "dispose of" could include "allot" or "assign." It is clear from the method of implementing the Scheme – bringing individual graduates to live on the reserve, subdividing most of the reserve into farming lots, allocating these lots to graduates, giving extra assistance to these farmers, and obtaining Consents to Transfer to make them members of the Band – that a necessary aspect of the File Hills Scheme from its inception was to transfer the use and control of reserve land into the care and possession of third parties, the individual graduates.

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[383] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Exhibit 8, p. 5).

[384] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Exhibit 8, p. 5).

[385] *Black's Law Dictionary*, 7th ed., "disposition."

[386] *Roget's Thesaurus of English Words and Phrases* (London: Longman Group, 1987).

On this issue, the First Nation makes the point that, although transfers of Indians from one band to another were not uncommon, Treaty 4 did not contemplate that the Crown could unilaterally introduce a program "under which members would become a minority on their own reserve and would be deprived of their ability to utilize their reserve."[387] In his oral submission, counsel for the First Nation described in more detail the relationship between Treaty 4 and the Crown's decision to launch the Scheme:

> It simply could not have been in the contemplation of the signatories to treaty on behalf of the Peepeekisis First Nation that the department could through what it called an experiment or a scheme pass control of their lands to others, and I think what you need to look at is the difference between a transfer of an individual or the transfer of a small group and contrast that with what the scheme itself was designed to do. From the very beginning it's clear that Graham's intention was to bring a large number of industrial school graduates onto the reserve, that's why he surveyed 96 80-acre lots in 1902.[388]

Canada, for its part, does not respond directly to the question of the Crown's obligation under treaty when it devised the File Hills Scheme. Instead, it emphasizes the point that the Crown was acting in furtherance of the treaty objective of encouraging agricultural pursuits.[389]

The panel finds that the Crown intended a "disposition" of this land in favour of the graduates when it decided to provide Peepeekisis reserve land to the industrial school graduates for their exclusive use and occupation. We consider that the use of the phrase "or otherwise dispose of" in Treaty 4 should be interpreted in accordance with the principle that the words be given the sense they would naturally have held for the parties, and that ambiguities be resolved in favour of the aboriginal signatory. The practical effect of the Crown's plan to give exclusive use of a portion of the Band's reserve land to the graduates was a disposition that should have been preceded by "the consent of the Indians entitled thereto first had and obtained," in the words of the treaty.

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[387] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 69.

[388] ICC Transcript, April 3, 2003, pp. 58–59 (Thomas Waller, QC).

[389] Written Submission on Behalf of the Government of Canada, December 23, 2002, paras. 87 and 91.

The panel concludes that when the Crown decided to undertake this Scheme on the Peepeekisis reserve, rather than set up a separate reserve for the experiment, it triggered the Crown's duty under Treaty 4 to seek the prior consent of the Peepeekisis Band to the Scheme.

Before leaving the issue of the Scheme's compliance with the treaty, the panel notes the First Nation's alternative argument that the Scheme constituted a "public work" of the Crown on reserve land.[390] As such, under Treaty 4, according to the First Nation, the Band should have been compensated. We agree that similarities exist between "public works," as contemplated by the treaty, and the Crown's decision to use a portion of reserve land for its own purposes. In our view, however, this interpretation of "public works" would violate the principle that a term of the treaty must not be altered by exceeding what is realistic or possible given the language.[391] We do not find the First Nation's argument persuasive on this point.

The nature of the consent that the Crown was obliged to seek from the Peepeekisis Band to the Scheme itself is germane not only to the question of compliance with the treaty but also to the questions of compliance with the *Indian Act* and with any fiduciary obligations owed by the Crown to the Band. We turn to the *Indian Act* first.

Did the Crown's Decision to Undertake the Scheme Comply with the *Indian Act*?

The *Indian Act* is based on a policy of general inalienability of Indian lands, except to the Crown, in order to prevent the erosion of the Indian land base. In *Opetchesaht Indian Band v. Canada*, Major J, writing for the majority of the Supreme Court, explained the policy behind the rule of general inalienability:

> Both the common law and the Indian Act guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: *Blueberry River Indian Band*, *supra*, at p. 370, *per* McLachlin J.

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[390] See Written Submission of the Peepeekisis First Nation, October 21, 2002, paras. 71–72; and Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 90.

[391] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 61.

> On the other hand, the Indian Act also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. *The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests.* In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period longer than one year, only band council approval is required.
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> It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected.[392]

The Supreme Court identifies two obligations of the Crown in its legislative oversight of Indian Bands whose land base may be eroded. The first is to obtain the collective consent of the band or band council, depending on the type of disposition; the second is to respect its autonomy "in decision making affecting its land." In this claim, the interest to be protected was the Band's interest in its reserve land in 1898, when the File Hills Scheme was launched. Neither the panel nor the parties have found any evidence that in or around 1898 the Crown approached the Peepeekisis Band to explain the scope and purpose of the Scheme and to seek the Band's consent to launch this experiment on its reserve. Indeed, Canada acknowledges that "[t]he only aspect band members may not have been fully aware of is the scope of the farming project, in terms of numbers of transferees and amount of land necessary."[393] Whether the Crown itself was fully aware in 1898 of the implications in terms of final number of graduates and the amount of land necessary to accommodate them is not clear; but government officials, in particular William Graham, must have known that the File Hills Scheme would have permanent consequences for the Peepeekisis Band.

Did the Crown protect the Band's interest in its reserve? The panel finds it particularly telling that, as early as 1901, Indian Agent Graham's success in establishing ex-pupils in farming operations was rewarded when the department provided him with $1,500 of the $2,000 earmarked in the estimates "to assist ex-pupils residing on the reserves to start farming."[394] Graham's work in advancing ex-pupils in his agency was to become a model for others.[395] Not only does the record illustrate that the File Hills Scheme was intended to be permanent, but it also reveals that the Scheme's success was premised on the need to separate the graduates residing within the Colony from the individuals who were not "the most promising graduates of the schools."[396] Graham's own words in his 1907 "special report dealing with the File Hills ex-pupil colony" are illustrative:

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[392] *Opetchesaht Indian Band v. Canada*, [1998] 1 CNLR 134, paras. 52–54. Emphasis added.

[393] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 120.

> This is the only Indian Colony I know of in this province, and this system of handling ex-pupils is the only way, in my opinion, to grapple with the Indian problem. I believe the giving of assistance to young Indians and sending them back to their reserve among the old surroundings is a waste of money. I believe there would be no results in nine cases out of ten, no matter what assistance had been given, as the old Indians' influence would prove too strong.[397]

According to the community session testimony of Archie Nokusis, "Graham would see to it that the original band members were all – were all put in one place to keep them from moving around using the excuse that they interfered – they didn't want them to interfere with the farmers that they were bringing in."[398] His brother Daniel Nokusis testified that their father, Edwin Nokusis, moved to the western portion of the reserve because of harassment.[399] Later, in 1912, Shave Tail, the son of

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[394] J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 2, 1901, NA, RG 10, vol. 4951 (ICC Exhibit 1, p. 310, transcript p. 308).

[395] W.M. Graham to the SGIA, February 4, 1901, with marginal note from J.A. McKenna to [J.A.] Smart, DSGIA, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 303).

[396] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[397] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 156–59 (ICC Exhibit 1, p. 481).

[398] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 342, Archie Nokusis).

[399] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 347–48, Daniel Nokusis).

Chief Peepeekisis, sent a letter of complaint to the department: "I had built a good house on my quarter and brook [sic] about 40 acres and Graham took this farm for his own use."[400]

Daniel Nokusis also explained what his father encountered on returning to the reserve after finishing his schooling in 1907 or 1908:

> ... he went out visiting relations, and to his surprise, you know, he found the band much smaller than it was before, and he kept asking them where are they he says. Did they die too? No, they said. They said life was getting too rough, and they didn't like it, so they just rode off in the night and back to Cypress Hills. ... And Alec Nokusis' mother left and went and lived with old Mestatic [phonetic], and he took Alec Nokusis along, and he became a band member of Okanese.[401]

Alex Nokusis explained in an affidavit in 1988: "Soon members of the Band living on the land Graham selected for his Colony began to get squeezed out of it. Squeezed out until one day I also had to move away from there. There was no room for me there. This caused my transfer to Okanese Band."[402]

The panel gives significant weight to this community session evidence as illustrating the gradual diminishment of the *original* band members' interest in its land base. The witnesses were forthright and steady in their manner, and the evidence provided was detailed and unaffected. The totality of this testimony not only points to a lack of consent by the *original* band members to the magnitude of such a plan but illustrates that the Crown was focused entirely on the best interests of the graduate farmers, paying scant attention to the fate or well-being of the *original* Band. The panel cannot see how this Scheme could be seen to protect the interests of the Peepeekisis Band from the erosion of its reserve land base. Contrary to the Crown's duty under the *Indian Act* to respect a band's interest in its land, as interpreted by the Supreme Court in *Opetchesaht*, both the criteria for admission and the eventual success of the Scheme were premised on ensuring that the interests of the graduate farmers were met at the expense of the interests of the *original* band members.

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[400] Shave Tail to J.D. McLean, Department of Indian Affairs, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 549–50).

[401] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 304, Daniel Nokusis).

[402] Affidavit of Alex Nokusis, Peepeekisis Reserve, December 31, 1988 (ICC Exhibit 2A, p. 62).

It has not escaped our notice that the 1955 Bethune Advisory Committee, made up of three senior departmental officials charged with reviewing the results of the Trelenberg Inquiry into Peepeekisis membership protests, was of the opinion that Graham and the Department of Indian Affairs showed a disregard for "the fact that the lands were set aside for the Peepeekisis Band of Indians alone. The scheme resulted in the best lands in the reserve being made available to other Indians contrary to the provisions of the treaty as interpreted by legislation."[403] This governmental committee, almost 50 years ago, was similarly persuaded that both Treaty 4 and the *Indian Act* had been breached by the Crown's decision to situate a farming colony on the Peepeekisis reserve.

This finding of breach of treaty and of the *Indian Act* is a serious one, not only because it calls into question the honour of the Crown but because, since the Supreme Court of Canada case of *Guerin v. The Queen*,[404] such breaches may give rise to a breach of the fiduciary obligation of the Crown to a First Nation. The 1955 Advisory Committee findings pave the way for such an analysis.

Before turning to the question whether the decision to launch the Scheme at Peepeekisis breached any fiduciary obligations of the Crown, the panel notes that the First Nation presents in the alternative the argument that the Scheme constituted a "special reserve," as defined by the 1906 *Indian Act*, largely on the basis of one letter from William Graham describing the Colony in these same words.[405] We find, however, that the definition of a "special reserve" in the *Indian Act* denotes a separate reserve set apart for reasons that are irrelevant to this claim.

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[403] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, to the Director, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 757).

[404] *Guerin v. The Queen*, [1984] 2 SCR 335.

[405] See Written Submission on Behalf of Peepeekisis First Nation, October 21, 2002, paras 76–78; and Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 90.

Did the Decision to Create the Scheme at Peepeekisis Give Rise to a Fiduciary Obligation?

The Law

In the 1984 decision in *Guerin v. The Queen*,[406] the Supreme Court of Canada found that, in certain circumstances, the federal Crown owes a fiduciary obligation to a First Nation and is legally accountable to it for any breaches. The Court in *Guerin* also established that this obligation is *sui generis*, or unique in its nature. Wilson J addressed the relationship between the Crown's fiduciary obligation and the *Indian Act* provisions regarding the uses to which reserve land may be put:

> The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 [of the *Indian Act*] is a statutory acknowledgement of that obligation.[407]

Wilson J added that the Crown holds the lands "subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction."[408]

In dealing with reserve land that has been surrendered, which was the case in *Guerin,* the Crown has absolute discretion and the band is totally dependent on this discretionary power. Dickson J stated:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. ... This discretion on the part of the Crown ... has the effect of transforming the Crown's obligation into a fiduciary one.[409]

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[406] *Guerin v. The Queen*, [1984] 2 SCR 335.

[407] *Guerin v. The Queen*, [1984] 2 SCR 335 at 349.

[408] *Guerin v. The Queen*, [1984] 2 SCR 335 at 350.

[409] *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84.

In further explaining the Crown's obligation as a fiduciary, Dickson J quoted with approval from an article by Professor Ernest Weinrib: "[T]he hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."[410] Dickson J concluded that, "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."[411]

The concept of the federal Crown's fiduciary obligation has continued to evolve since *Guerin*. The 1990 Supreme Court's decision in *Sparrow*[412] expanded the concept of the fiduciary obligation in adjudicating on the aboriginal rights enshrined in section 35 of the *Constitution Act, 1982*.[413] Section 35(1) protects both aboriginal and treaty rights. Although the *Sparrow* case concerned an aboriginal right only, the Court did not confine its interpretation of section 35(1) – that the Crown has a responsibility to act in a fiduciary capacity – only to aboriginal rights. The question whether the Crown has the same responsibility in regard to treaty rights has been settled more recently by *R. v. Badger*,[414] *R. v. Cote*,[415] and *Ontario (Attorney General) v. Bear Island Foundation*.[416] These cases have indicated that, whether the right in question is an aboriginal or a treaty right, section 35 and the honour of the Crown demand that they be dealt with in the same way. In our view, therefore, a fiduciary obligation may arise from either a treaty right or an aboriginal right.

In addition, fiduciary obligations can clearly arise in the context of the Crown's statutory powers over aboriginal peoples. Section 91(24) of the *Constitution Act, 1867* gives the Parliament of Canada exclusive jurisdiction to enact laws in relation to "Indians, and Lands reserved for the Indians." A series of cases – *Guerin, Sparrow, Blueberry River* (commonly referred to as "*Apsassin*"), and *Osoyoos* – all recognize this obligation.[417] The effect of these cases has been an acknowledgement in law of the existence of the fiduciary relationship between the federal Crown and aboriginal peoples. At the same time, however, the courts have limited the scope of the fiduciary obligation arising from this relationship. Both the existence and the scope of the obligation are primarily a question of fact that must be proven on a case-by-case basis.

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[410] *Guerin v. The Queen*, [1984] 2 SCR 335 at 384, quoting Ernest Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 7.

[411] *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

[412] *R. v. Sparrow*, [1990] 1 SCR 1075.

[413] *Constitution Act, 1982*, s. 35(1).

[414] *R. v. Badger*, [1996] 1 SCR 77 at 812–13.

[415] *R. v. Cote*, [1996] 3 SCR 139 at 164, 185.

[416] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570 at 575.

The distinctive nature of the fiduciary relationship lies in the relative legal positions of the parties: one party finds itself at the mercy of the unilateral exercise of discretionary power by the other party, and that power may have an effect on the legal or practical interests of the beneficiary. The resulting fiduciary obligation compels the Crown to protect and preserve Indian rights to their reserve lands. If a surrender, for example, is contemplated, because the Crown holds the discretionary power to decide what is in the best interests of the Indians who surrendered it, the subsequent use or sale of the land must be to their benefit. In addition to the creation of a fiduciary obligation in the context of unilateral action on the part of the Crown, whether legislative or administrative, the obligation is also created in the context of bilateral actions such as treaties or other agreements.

The parties in this claim are in agreement that there is no general fiduciary obligation that arises out of the fiduciary relationship between the Crown and the First Nations. The facts of the present inquiry involve a situation in which a reserve was created, and the File Hills Scheme was subsequently undertaken and implemented on that reserve. There was, unlike the situation in *Guerin*, no surrender of the Peepeekisis reserve. *Wewaykum Indian Band v. Canada*, a 2002 decision of the Supreme Court, however, is instructive in reviewing the most recent cases on the Crown's fiduciary duty in a situation where a reserve exists and no surrender has taken place.

The *Wewaykum* decision, in reviewing the law in the Supreme Court cases of *Guerin* and *Apsassin*, provides us with the most relevant test by which the File Hills Scheme can be measured against the Crown's fiduciary duty. Speaking for the Court, Binnie J said:

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[417] *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 456; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (referred to as *Apsassin*); *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

Once a reserve is created, the content of the fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

The content of the fiduciary duty changes somewhat after reserve creation, at which time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s.35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen, [1986]* 1 F.C. 3 (C.A.).

At the time of reserve *disposition* the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members). In *Blueberry River*, McLachlin J. observed at para. 35:

> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

...

It is in the sense of "exploitative bargain", I think that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). This is consistent with *Blueberry River and Lewis*. Wilson J.'s comments should be taken to mean that *ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.*[418]

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[418] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 97–100. Emphasis added.

In its report on the *Alexis First Nation: TransAlta Utilities Rights of Way* claim, the Commission has also recently reviewed the fiduciary obligations of the Crown in the context of an expropriation on a reserve for the purpose of a transmission line.[419]

Unlike cases concerning surrenders and expropriations, however, the Peepeekisis claim presents some unique facts that are not found in the case law. As the parties have advised, the likelihood of finding any jurisprudence that spells out the Crown's fiduciary duty in these circumstances is remote. Nevertheless, the *Wewaykum* decision, including its reliance on the *Osoyoos* expropriation case and Wilson J in *Guerin*, confirms that, in a situation that follows the creation of a reserve but pre-dates surrender, the Crown is under a fiduciary duty to use ordinary diligence "to avoid invasion or destruction of a band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself."[420]

Did the Band Consent to the Scheme?

The primary question is whether the Band gave its consent to the colony Scheme. It is important to note that, in our opinion, "consent to the Scheme itself" and "consent to the transfer of memberships" constitute two separate investigations in this inquiry. The second will be discussed as one of the five methods Graham used to implement the Scheme.

The *Wewaykum* decision builds on the *Apsassin* test for finding valid band consent.[421] Although the *Apsassin* case concerned the surrender of a band, it set out the standard to be met when determining if a band gave valid consent to a transaction affecting its interest in reserve land. The three areas of inquiry, all of which are relevant here, are whether the Peepeekisis Band's knowledge or understanding of the transaction was adequate, a question that includes asking whether the Band ceded its decision-making power to the Crown; whether the conduct of the Crown and its agents tainted the process, making it unsafe to rely on the Band's understanding and intention; and whether the transaction itself was foolish or improvident, amounting to exploitation of the band.[422] We are mindful that *Apsassin* dealt with a "transaction," whereas the Peepeekisis claim concerns a Crown-based initiative on reserve land. We also note that it was the Crown itself conducting this experiment, not a third party.

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[419] ICC, *Alexis First Nation TransAlta Utilities Rights of Way Inquiry Report* (Ottawa, March 2003), to be reported (2004) 17 ICCP.

[420] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 97–100.

[421] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 117.

The panel accepts Canada's argument that the fiduciary obligation of the Crown in these circumstances "is limited to addressing the particular interests of the First Nation in the circumstances giving rise to the facts of this case."[423] The First Nation similarly contends that the Canadian courts have adopted the approach of examining "the circumstances in effect at the time that any purported consent" was given.[424] The panel also agrees with Canada's view that the Band's paramount interest was to be informed regarding the farming project and its implications, "*and to be afforded the opportunity to accept or reject the proposal.*"[425] However, the panel's understanding of the relevant circumstances in this case, and whether the Band was informed and afforded an opportunity to accept or reject the File Hills Scheme, differs from Canada's understanding.

The Circumstances

The most striking circumstances of this claim are as follows: first, the Peepeekisis reserve had good-quality farm land. The population of the Band, however, was declining, and it was pooling its farming efforts with the other File Hills Bands.

Second, the Peepeekisis Band had no recognized leadership during the critical years when the Scheme was devised and implemented. Before the arrival of William Graham, the Peepeekisis Band had experienced significant changes in its relationship with the Crown. In 1883, Inspector Wadsworth reported on his visit to the File Hills reserves, noting that Chief "Peepeekeesus" was the last of the Chiefs settled at File Hills to

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[422] *Blueberry River Indian Band v. Canada (Department of Indian and Northern Development)*, [1995] 4 SCR 344 (referred to as *Apsassin*).

[423] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 112.

[424] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 118.

[425] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 112. Emphasis added.

> come in from the plains, having only arrived at Qu'Appelle with Piapot last summer[;] a small portion of his band had settled the year before: they were all hard at work, and "mean business". I think it will be found that this band will far surpass any others in this section before very long, the Chief has a large comfortable house and it was very clean, there are 13 houses and 3 stables altogether.[426]

The record indicates that the Peepeekisis Band did not support the government during the 1885 Riel Rebellion and that Chief Peepeekisis and Chief Starblanket were jailed. Although both were later released owing to insufficient evidence, an 1885 letter from Indian Commissioner Edgar Dewdney said, "They will be dealt with later by us." He continued:

> The actions of these Indians this spring and summer and the backwardness of their condition in regard to their self support have proven to me that they must be placed on a different footing than heretofore.
>
> What I would suggest is to remove the present Farming Instructor at File Hills and appoint a directly responsible agent in his stead. ...
>
> What the File Hills Indians want is a man that can handle them without fear, and who will take an interest in them and by constant application to work, help them so employed that they will have no time to either wander off their Reserve or plot mischief.[427]

Indian Agent P.J. Williams was appointed in August 1885.

Chief Peepeekisis was listed in the departmental records as the Chief until his death in 1889, seven years before Graham's arrival. The last of Peepeekisis' headmen passed away in 1894. Between 1894 and 1935 there was no recognized Chief or council of the Peepeekisis Band. Thus, when Graham arrived in Peepeekisis as Acting Indian Agent in 1896, the Band was without any recognized leadership.

The reason why the Department of Indian Affairs permitted more than 40 years to pass before recognizing the Peepeekisis leadership is open to interpretation. On the one hand, there is no indication on the record that Chief Peepeekisis or his headmen had been deposed of their positions as a result of the Riel Rebellion, nor are there any remarks in the record that they were labelled as

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[426] T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, May 30, 1883, NA, RG 10, vol. 3640, file 7452-1 (ICC Exhibit 1, pp. 51–52).

[427] E. Dewdney, Indian Commissioner, Department of Indian Affairs, to the SGIA, July 7, 1885, NA, RG 10, vol. 3671, file 10836-1 (ICC Exhibit 1, p. 68).

"rebels." It is interesting to note, however, the way in which the department reacted to notification of Chief Peepeekisis' death. Indian Commissioner Hayter Reed wrote in 1889 that "[t]he death of this Chief offers a good opportunity for uniting in one band the Indians of Okanees and Peepeekisis reserves."[428] There is also evidence, outlined in the Historical Background, from some Peepeekisis band members and their descendants who blamed Graham for preventing Peepeekisis' son Shave Tail from assuming his hereditary position so that Graham could effectively assume the functions of Chief himself.[429] In any event, the Crown's fiduciary duty to protect the Band from an exploitative arrangement was greatly enhanced by the fact that the Band was leaderless during the critical years.

Third, the role and conduct of Indian Agent Graham cannot be ignored in understanding how the File Hills Scheme came into being. Although we shall look later at Graham's particular approach to implementing the Scheme, it is obvious to the panel that the notion of starting a farming colony on an existing reserve would not have taken root without Graham's active involvement. Canada advises that much of the evidence about Graham in this claim amounts to "a general slur of Graham's character": it is based on hearsay and rumour that he was a dictator and tyrant, and, as such, "is not reliable by its very exaggerated and quasi-legendary nature."[430] While we agree that this claim is not, and should not be, a prosecution of the Indian Agent of the day, we are convinced that Graham was not only in the right place at the right time from the Crown's point of view but highly motivated to succeed with this experiment.[431] Moreover, his strong personality enabled him to exert considerable control over the Peepeekisis people.

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[428] Hayter Reed, Indian Commissioner, to SGIA, May 11, 1889, NA, RG 10, vol. 3818, file 57842 (ICC Exhibit 1, p. 86).

[429] See Shave Tail to J.D. McLean, Department of Indian Affairs, Ottawa, July 2, 1912, NA, RG 10, vol. 3940, file 121698-14 (ICC Exhibit 1, pp. 549–50); and ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 264, Don Koochicum).

[430] Written Submission on Behalf of the Government of Canada, December 23, 2002, paras. 121–22.

[431] William Graham was promoted several times during his long involvement with the colony Scheme, from Acting Indian Agent to Inspector of Indian Agencies and finally to Indian Commissioner. Although there is no direct link between his promotions and the favourable reports concerning the File Hills Scheme, the record does indicate that his superiors were impressed with the "successful" experiment at Peepeekisis and its potential for other reserves: see Marian Dinwoodie, "William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency," 1996 (ICC Exhibit 9A, pp. 4–5, 82–83, 126–29).

The elders' testimony about Graham's character is, in our view, generally consistent with the observations of past members of the Peepeekisis First Nation and officials of the government. As in most specific claim inquiries, the elders who gave testimony were recounting information that they had been told by their parents, grandparents, or other family members. Here, many of the witnesses – Alice Sangwais, Gilbert McLeod, Jessie Dieter, Elizabeth McKay, Wesley and Elwood Pinay, Don and Stewart Koochicum, Archie and Daniel Nokusis, and Aubrey and Glen Goforth – recounted stories of the Band's experience with William Graham. To them, he was a mean person who was rude to the people, cheated them, treated them like children, and, for the most part, behaved like a dictator or the government of Peepeekisis. Some witnesses said that both *original* band members and graduates were afraid of Graham. Others focused on some of his more notorious actions – forcing some graduates into arranged marriages before moving them to Peepeekisis, using threats to withhold rations or passes to leave the reserve, and threatening jail to coerce people into obeying him. Not one witness provided any evidence that would contradict the overall impression that, during the critical years, most of the Peepeekisis people feared and despised William Graham. Stewart Koochicum summed up the elders' testimony well: "There's only one thing I'd like to say is I think everybody suffered under Graham, not just the west or the east or south [of the reserve], everybody suffered, eh."[432] It is the cumulative impact of these individual character traits on the Peepeekisis community that is important in assessing whether Graham's conduct met the standard that enabled the Band, in Canada's words, to "be informed regarding the farming project and its implications, and to be afforded the opportunity to accept or reject the proposal."[433]

In addition to the evidence of the current Peepeekisis elders, the panel has considered another source of information that could shed light on Graham's behaviour in 1898, when the Scheme was launched. Fred Dieter's evidence before the Trelenberg Inquiry shows that, when Dieter, one of the earliest graduates to settle at Peepeekisis, first met with Graham to discuss the plan, he was told that Graham had "called a meeting of the Old Men, of the Originals, but he was turned down. But, he said there was an Indian Act that he could overrule them for the benefit of the Reserve. At that time, I didn't know anything about the Indian Act."[434] Dieter was, by all accounts, a successful farmer who benefited from the Scheme and who would have had no reason to fabricate such testimony. It is uncertain from his account why Graham was meeting with the Old Men. Nevertheless, Graham's apparent attitude towards the rights and participation of the Peepeekisis Band, as evidenced by this statement, smacks of arrogance and disrespect. There is no doubt that, at the inception of the Scheme in the late 1890s, Graham's character and conduct in his role as Indian Agent were instrumental in influencing the process.

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[432] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 298–99, Stewart Koochicum).

[433] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 112.

Finally, it is clear from the record that the success of the File Hills Scheme was premised on the separation of industrial school graduates from the general population of the Peepeekisis Band. The primary criterion for entrance into the File Hills Scheme was to be a promising industrial school graduate not a Peepeekisis band member. The record bears out that considerations of band membership and the legal entitlements associated with that membership were not at the forefront of Graham's actions. A review of his annual reports and the exchange of correspondence illustrates that Graham's foremost and overriding concern became the success and welfare of the File Hills Colony and its farmers, not the interests and welfare of the *original* band members.

The Band's Understanding of the Scheme

Having reviewed a number of circumstances at play in 1898, it is necessary to ask whether the Band's understanding of the Crown's plan was adequate. In our view, an initiative of this magnitude demanded that Graham hold a series of meetings with the Peepeekisis Band to explain that the government wished to conduct a farming experiment on its reserve; that to do so, a significant portion of the reserve would be subdivided and provided to graduates both from the File Hills Bands and elsewhere; that these Indians would have to be or become members of the Peepeekisis Band; and that the objective was a permanent farming colony. The band members would have needed to know that the Crown was not planning to expand their reserve or otherwise compensate them for the land to be used for the graduates, but that a successful farming enterprise would, it was hoped, benefit everyone through greater economic prosperity and the presence of role models. Graham would have had to tell the band members that they could either participate in the Scheme on an equal basis with the graduates or not. These points would have constituted the minimum information required prior to holding a special meeting of the Band to approve such a Scheme. We deliberately refer to the "Band," since there was no recognized Chief and council that could have provided consent, even if consent by band council alone would have been sufficient. Such a meeting would have had to be recorded in detail by Graham and forwarded to the department.

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[434] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 164–65 (ICC Exhibit 6A, pp. 172–73, Fred Dieter).

Instead, there is no evidence whatsoever in the department's records that Graham organized any meetings with band members to explain the Scheme and to give them the opportunity to accept or reject it. If the meeting of the "Old Men" referred to by Fred Dieter was called to obtain consent to the Scheme itself, it is obvious that, with no further evidence on the record, such a meeting would not have met the minimum procedural requirements. Even if it had, the "Old Men" turned him down.

Graham's relationship with the Band was so poisonous and disrespectful that we can infer he did not consider it necessary to provide the details and implications of the proposed Scheme to the Band or to follow a fair and just process to gain its support. His entire focus was on the graduates and their success at Peepeekisis.

The adequacy of knowledge and understanding is one of the tests for valid consent, as enunciated in *Apsassin*. We find that the Band's understanding of the Scheme itself and of its potential impact on the Band's lands and identity was not only inadequate but largely non-existent. We find Canada's argument that there existed "an awareness in the community"[435] of Graham's project and objectives because "'the original members' were aware of the subdivision of land on the Peepeekisis reserve and the placement of graduates on plots prior to the time that their consents to admit the graduates as band members was sought" to be entirely unconvincing.[436] In this case, because the Band had no knowledge at all of the Crown's decision to conduct this experiment, it was not even placed in a situation where it ceded all decision-making authority to the Crown.

Graham's conduct, as described above, cannot be said at this early stage to have "tainted the process," but it meant that the Band was kept in the dark about the Scheme.We will, however, subject his conduct to further scrutiny in our analysis of the implementation phase of the farm Colony.

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[435] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 101.

[436] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 102.

Was the Introduction of the Scheme Exploitation of the Band?

The panel makes three observations, based on the record, that are relevant to the issue of exploitation in this claim.

First, Graham knew about and may even have influenced the fact that the Band had no Chief or other recognized leaders.

Second, the Crown's officials must have known that the very act of appropriating a Band's reserve land for an experiment that was intended to be permanent, without providing additional lands, would be taking unfair advantage of the Band.

Third, Canada paints a favourable picture of the intentions of Graham and the department in those years – in particular concerning those expected to benefit from the Scheme. We have already discussed some reasons why, according to Canada, the Crown preferred the Peepeekisis reserve for the Scheme – it had good farm land, a declining population, and proximity to the agency. In addition, says Canada, the Crown anticipated that the four File Hills Bands would amalgamate. When that idea was rejected, the Crown focused instead on obtaining individual transfers of membership into the Band in order to implement its experiment. "This experiment," says Canada, "was carried out for the benefit [of] the Indian population as a whole, for the benefit of the individuals involved and, if they chose, for the benefit of the 'original members.'"[437]

In this context, we refer to another expression of the Crown's intentions, as expressed in its December 2001 rejection letter to the First Nation. The author not only rejects any possibility of a fiduciary duty arising in a non-surrender situation but states that "the Crown in the exercise of its statutory duties *had to* assess the competing interests of the Indians."[438]

Taking these two expressions as some evidence of the Crown's intentions, the panel cannot agree with Canada that the Crown was appropriately concerned with the interests of the Peepeekisis

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[437] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 118.

[438] Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada, to Chief Walter McNabb, Peepeekisis First Nation, December [24], 2001 (ICC Exhibit 4B, p. 4). Emphasis added.

Band or that the *Indian Act* somehow compelled it to devise a project that would favour one group of Indians to the clear disadvantage of another. The graduates, and to a much lesser extent the "Indian population as a whole," were clearly the priorities of the Crown. The panel acknowledges that, in the Canada of the late 1800s, policies designed to enhance the future of industrial school graduates and the entire Indian population may have been judged as reasonable and consistent with the Crown's obligations as a fiduciary. Yet the Crown's unilateral decision in favour of one group, the industrial school graduates, when that decision disregarded the Band's legal interest in its reserve land, raises serious questions about the motives of the Crown at the time.

The primary beneficiaries of the File Hills Scheme, in our view, were intended to be the graduate farmers, although the community session testimony reveals that some graduates were sent to Peepeekisis against their will.[439] The secondary beneficiary of the Scheme was Indian Agent Graham himself, who was lauded by the department and by international observers for his work in establishing a successful farming colony on the Peepeekisis reserve.[440]

As for the original Band, we shall examine the First Nation's argument that the Band derived no benefit from the Scheme and, in fact, became a people dispossessed on its own reserve. As Graham developed and cultivated the File Hills Scheme as a model for the successful establishment of industrial school graduates, the Peepeekisis Band, as it existed in 1898, was gradually displaced and pushed to the northwest corner of the reserve. According to Elizabeth McKay, whose grandfather was Louis Desnomie, some band members made the decision to move voluntarily: "There was McNabbs. There was Keewatins, and his dad here, Nokusis, they all moved to the west because they didn't want to live this side. They weren't colony people."[441] In contrast, Don and Stewart Koochicum spoke of some *original* band members, including their grandparents, being asked to move:

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[439] See, for example, ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 261, Don Koochicum).

[440] See, for example, Memorandum for the Secretary, Department of Indian Affairs, September 15, 1900, NA, RG 10, vol. 3985, file 173738-1 (ICC Exhibit 1, p. 300); Clifford Sifton, SGIA, to the Governor General in Council, February 4, 1901 (ICC Exhibit 1, p. 302); Order in Council (Canada), April 4, 1901, NA, RG 10, vol. 3878, file 91839-7 (ICC Exhibit 1, p. 312); and Sarah Carter, "Demonstrating Success: The File Hills Farm Colony" (fall 1991) 16 no. 2 *Prairie Forum* 158 (ICC Exhibit 10A, p. 2).

[441] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 147, Elizabeth McKay).

> Commissioner Purdy: And did your grandparents say anything about why they moved? Did they move voluntarily?
> Mr. D. Koochicum: No. No. They were removed.
> Commissioner Purdy: And why did they say they moved?
> Mr. D. Koochicum: Because Graham wanted to – wanted the farmland. He wanted to –
> Mr. S. Koochicum: He wanted to create this farm here, this colony farm, so they were asked to move out there, so the only place they could move is on the west end over there.
> Commissioner Purdy: So they were asked to move?
> Mr. S. Koochicum: In order for Graham to build his so-called farm here, you know.[442]

Canada's counsel points out, however, that Mr Nokusis, for one, was never denied assistance or the opportunity to farm; Graham supplied him with two oxen, notwithstanding Mr Nokusis' request for horses. In general, says Canada's counsel,

> we don't really have any evidence as to whether the Indian agent, you know, encouraged or offered this opportunity to original members, but neither do we have any evidence that they were denied that opportunity, and we have at least one example of someone who asked to join the farming project and who was told yes, so again the opportunity was available.[443]

Given the differences in the experiences of *original* members, as recollected by their descendants, there is insufficient evidence for the panel to conclude that most *original* members were physically "forced off" the lands to be subdivided. Nevertheless, Graham's strategy was to set up a separate system of educated farming students who would not mix with the *original* band members. The result was a situation in which the *original* band members were either excluded or believed themselves to be excluded from the model community. Graham pressured some to move; for others, their intense dislike of Graham and the presence of outsiders on their land would have been incentive enough.

It is apparent that, as the Scheme progressed, it was the colony farmers and not the *original* band members who succeeded, both because of the former's schooling in farming and because they gradually took over the best farm land on the Peepeekisis reserve. In 1906, Indian Agent William Gordon wrote to Deputy Superintendent General Frank Pedley that

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[442] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 266, Commissioner Purdy, Don and Stewart Koochicum).

[443] ICC Transcript, April 3, 2003, p. 173 (Uzma Ihsanullah).

> the ex-pupil colony, which was started five years ago, is making good progress and is growing in numbers and in the amount and quality of the work done. As the number of homes is added to, the ex-pupils become more satisfied, and each is becoming more anxious to excel. The homes are becoming more and more comfortable, the acreage under cultivation is increasing rapidly, the horses and cattle, pigs and chickens are increasing in numbers; the wells dug this summer furnish a supply of good water; and all things considered, these young people are in a better position than most white settlers who began five years ago.[444]

In his May 1907 Special Report to Pedley regarding the "File Hills ex-pupil colony," Graham compared the conditions of the members of the "colony" to what he referred to as the "ordinary" Indian people residing on the rest of the reserve:

> As the department is aware, these people own and operate their own steam thresher, and in addition to threshing their own crops, they thresh that of the ordinary Indians outside of the colony.
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> ...
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> It is a noteworthy fact that the general health of all the colonists has noticeably improved. There is less sickness in this colony than there is among other Indians on the reserve, which fact is attributable, no doubt, to the manner in which their food is prepared and to the generally improved conditions under which they are living.[445]

In addition to Graham's comparison of the living conditions for the two groups, Shave Tail, as we have mentioned, shed some light on the differences when he reported to Secretary J.D. McLean that he intended to leave Peepeekisis because Graham gave him no assistance and had taken his house and farm land for his own use: "It is a funny way when I see parties not been in treaty are farming on our Reserve and treated better."[446]

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[444] W.M. Gordon, Indian Agent, Qu'Appelle Agency, to Frank Pedley, DSGIA, July 23, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 145 (ICC Exhibit 1, p. 473).

[445] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 156, 159 (ICC Exhibit 1, pp. 479, 481).

The panel is hard pressed to find evidence that the original Band benefited from the Scheme on its reserve. When asked by the Commission's counsel whether Peepeekisis suffered because of the Colony, Gilbert McLeod, whose father Henry McLeod was one of the most successful graduate farmers, testified: "Well I don't see in what manner. To me I can't see – they claim that land was taken from them, but I mean there was compensation of more land ... [j]ust south of the track. Just south of Lorlie."[447] Mr McLeod, however, was the only witness who suggested that the original Band may have been compensated. While undisputed evidence exists that $20 per band member was paid under the 1911 Fifty Pupil Agreement, there is no evidence to corroborate Mr McLeod's statement regarding compensation of more land.

Elizabeth Pinay, who explained that she is sensitive to both the graduates and the *original* members because of her family's roots, spoke in a forthright manner about the impact of the Colony on the traditional groupings, or "camps," at the File Hills reserves, each with its own Chief and members who were related to each other. According to Ms Pinay, the camps functioned together and looked after one another, but the Colony had an impact on that structure:

> When you bring in all these different peoples, like we call division, disruption and crowding, mainly crowding. You can't say to your neighbours I need room for my cow. You know, it's getting to be like that. You know, expand, no room to expand. All the land is pretty well divided. Some people have no land.[448]

Don Koochicum recalled that his grandparents ended up on the west side of the reserve on land the size of "a postage stamp"[449] and that he, like some others, received threats for going onto subdivided land to hunt or to cut pickets: "I didn't understand. I thought this was the whole reserve even though it was subdivided, that we can go through ... And as you go along the road over here you see all –

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[446] Shave Tail to J.D. McLean, Department of Indian Affairs, July 2, 1912, NA, RG 10, vol. 3040, file 121698-14 (ICC Exhibit 1, p. 549).

[447] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 60–61, Gilbert McLeod).

[448] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, pp. 177–78, Elizabeth Pinay).

[449] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 256, Don Koochicum).

everything fenced off and everything."[450] Edwin Nokusis used to challenge the creation of an exclusive, prohibited area of the reserve by riding across the Colony's fields, but eventually the family "packed up and left for the west side of the reserve" because of harassment. He never farmed again, and neither do his sons. "Well, I tried to farm," said Archie Nokusis, "but I couldn't make a go of it. Where I farmed there was nothing but twitch grass. You couldn't kill that stuff if you tried."[451] Edwin Nokusis' son Daniel summed up the impact of the Colony on the original Band as follows:

> We got nothing compare[d] with these – these people that were put on the reserve. They got everything. Even if you – even – they just put out their hand like this, and the money just drops in from the farm instructor or whatever.[452]

An experiment that should have benefited the Peepeekisis Band as it existed in 1898 resulted in a community that was fractured and economically disadvantaged. By being dispossessed of their farm lands, the existing members underwent a greater struggle for survival on the land. D.J. Allan, in outlining the need to address the problems caused by the farming Colony, referred in 1945 to the *original* members as having been "pauperized in the process."[453] At the very least, the evidence is persuasive that many individual families suffered under the Scheme. Individuals were crowded into the northwest corner of the reserve, and control over band decisions was permanently altered when the graduate members became the majority. Moreover, the Scheme changed the way in which the Peepeekisis Band held its land, moving rapidly from collective to individual exclusive possession. The panel agrees with the First Nation's statement cited earlier: "While the overall impact of admitting a few members to a band may not have a significant impact on the distribution of resources, in a case where existing band members are to be outnumbered, the Scheme has effectively changed 'the band' and has substituted a different entity from that which entered treaty."[454]

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[450] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 260, Don Koochicum).

[451] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 358, Archie Nokusis).

[452] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 337, Daniel Nokusis).

[453] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, memorandum for file "Re: Band Membership," July 27, 1945, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 613).

The Crown did not compensate the Band for the reserve land it appropriated. Further, the consideration for the 1911 Agreement that gave the department the unilateral right to obtain memberships for up to 50 more ex-pupils and to place them on any amount of land anywhere on the reserve was $20 per person, or $3,000 in total. The panel considers this compensation for such a far-reaching deal to be inadequate, especially given the fact that it was the Crown making the deal with the Band, not a third party. The Crown had also planned to charge each of the additional graduates $60 each to settle at Peepeekisis, meaning that if the maximum of 50 graduates had been placed on the reserve, the Crown would have recouped the total cost of the Agreement.

The panel finds that there was virtually no benefit accruing to the Band from this Scheme. In fact, it was detrimental to the well-being of the *original* members and their descendants. The Crown took advantage of the absence of leadership on the reserve and profited by exploiting the Band's excellent farm land. The fact that the Crown considered the option of setting up a separate reserve, but failed to act on it in order to save money, is nothing short of exploitation of a people who were essentially minding their own business. Had a third party tried to negotiate such a deal with the Band, one would hope that the Crown would have intervened to prevent such an exploitative bargain. In this instance, however, the Band had no means of protecting itself from the actions of its fiduciary.

In conclusion, the Crown owed a fiduciary duty to the Peepeekisis Band, as it existed in 1898, to seek its consent to undertake the File Hills Scheme. As Canada itself has said, the Crown's duty involved informing the Peepeekisis Band of the proposed farming project and its implications, and affording the Band an opportunity to accept or reject the proposal. The panel has found no evidence to suggest that this consultation took place at that time or at all. Neither Graham nor other departmental officials met the test of ensuring that the Band had an adequate understanding of the File Hills Scheme and that it had a chance to give it formal approval before the arrival of the graduates. Instead, the Crown exercised sole decision-making power. It totally disregarded the Band's best interests in order to advance the interests of another group of Indians and the Crown's own objectives. By so doing and by not obtaining informed consent, the Crown breached its fiduciary obligation to the Peepeekisis Band.

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[454] Written Submission on Behalf of the Peepeekisis First Nation, January 13, 2003, para. 74.

THE CROWN'S METHODS OF IMPLEMENTING THE FILE HILLS SCHEME

The panel has found Canada to be in breach of Treaty 4, the *Indian Act*, and the Crown's fiduciary obligation to the Peepeekisis Band in 1898 by the very decision to establish the File Hills Colony on its reserve. We now set out the specific actions that the Crown took to implement the colonization Scheme on the Peepeekisis reserve to determine whether the Crown owed any other lawful obligations to the Band. Implementation began with the placement of a few graduates from other bands on the reserve, but, as the Scheme developed, it involved more arrivals, the transfer of memberships at different times, two subdivisions resulting in the majority of the reserve being divided into lots, the allocation of these lots to the graduate farmers over time, and special assistance given to them. In total, five different but complementary methods were used to implement the Scheme. The panel will determine if the Crown committed any breaches of Treaty 4, the *Indian Act*, or its fiduciary obligations in carrying out these specific acts.

The Placement of Non-Band Members on the Peepeekisis Reserve

In order to launch the Scheme, Indian Agent Graham began bringing graduates, or ex-pupils, of the Qu'Appelle Industrial School to Peepeekisis in or about 1897. Starting with Joseph McNabb and George Little Pine, the population of graduate farmers grew to at least four by 1899, and 15 by 1902. In 1911, when the Crown and the Peepeekisis Band signed an agreement to establish a different method of bringing aspiring Indian farmers to Peepeekisis, at least 20 male graduates were settled at Peepeekisis.[455]

The legal question before us is whether Graham's actions in bringing in non-band members before they were transferred into the Peepeekisis Band by consent of the Band and the Superintendent General of Indian Affairs are a breach of Canada's obligations.

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[455] The total number of male graduates admitted to the Band before1911, as set out in the Historical Background, was approximately 30, but some of that number evidently left the reserve or died before 1911, as the interest distribution paylist for the Fifty Pupil Agreement includes only 23 names of graduates who were not *original* band members. See interest distribution paylist for the Fifty Pupil Agreement, July 29, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 524–31).

The written text of Treaty 4 is silent with respect to the Crown's obligations to a band when non-band members arrive on a reserve created by treaty. No clear treaty issues arise here, although the panel is cognizant that the relevant *Indian Act* sections are intended to reflect the Crown's obligation to protect First Nations in the administration of their affairs.

The statutory requirements of the *Indian Act* regarding the right of an Indian to reside on a reserve, however, are very clear. First is an 1895 amendment to the 1886 Act dealing with the transfer of an Indian from one band to another:

> When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the superintendent general, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his *per capita* share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.[456]

Next, section 21 of the 1886 *Indian Act* mirrors the intent of the treaty promise of reserve lands by providing that only Indians of the band could settle, reside, and hunt on the reserve of that band, any permissions to the contrary being void. The 1894 amendment replacing section 21, however, provided an alternative option whereby the Superintendent General could permit a non-band member to reside legally on the reserve. The amended section 21 states:

> Every person, or Indian *other than an Indian of the band*, who, *without the authority of the superintendent general*, resides or hunts upon, occupies or uses any land or marsh, or who resides upon or occupies any road, or allowance for road, running through any reserve belonging to or occupied by such band, shall be liable, upon summary conviction, to imprisonment for a term not exceeding one month or to a penalty not exceeding ten dollars and not less than five dollars ... and all deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than

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[456] *Indian Act*, RSC 1886, c. 43 s. 140, as amended by SC 1895, c. 35, s. 8.

> Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.[457]

Looking more closely at the facts, we observe that the File Hills Scheme had its beginnings with the first arrivals of non-band members onto Peepeekisis reserve under the authority of Agent Graham – in particular, the arrival of Joseph McNabb (also known as Jose Kah-kee-key-ass), a student of the Qu'Appelle Industrial School. The record put before this Commission is unclear as to how McNabb made the decision to settle in Peepeekisis following his discharge from the school in 1897.[458] What is clear is that Graham allowed McNabb and his young wife to reside on Peepeekisis reserve and to build a house there, despite the fact that around this time Graham was strictly enforcing the pass system.[459]

In November 1897, Indian Agent H. Keith of the Carlton Agency responded to a letter from J.D. McLean, Secretary of the Department of Indian Affairs:

> In reply hereto your letter as above I have the honor to enclose herewith consent of Indians, there being no Chief or Headmen, of Petaquakeys Band for the transfer of No. 113 Jose "Kah-kee-key-ass" to Peepeekeesis Band (Joseph McNabb pupil No. 188 of Qu'Appelle Industrial School).[460]

The Consent form was dated November 3, 1897. The letter to which Keith was responding has not been located. Later that same month, McLean acknowledged receipt of Keith's letter "enclosing the consent of the Indians of Petaquakey's Band to the transfer of No. 113 Jose Kah-kee-key-ass to

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[457] *Indian Act*, RSC 1886, c. 43 s. 21, as amended by SC 1894, c. 32, s. 2. Emphasis added.

[458] W.M. Graham, Indian Agent, File Hills Agency, to Indian Commissioner, Department of Indian Affairs, September 2, 1898, NA, RG 10, vol. 1400 (ICC Exhibit 1, p. 293, transcript p. 286).

[459] Author illegible, Indian Agent, File Hills Agency, to Constable Manners, September 27, 1897, NA, RG 10, vol. 1400 (ICC Exhibit 1, p. 263); Indian Agent, File Hills Agency , to Father Hugonard, Principal, Qu'Appelle Industrial School, September 28, 1897, NA, RG 10, vol.1400, reel C-13936 (ICC Exhibit 1, p. 264).

[460] H. Keith, Indian Agent, Carlton Agency, to the Secretary, Department of Indian Affairs, November 1897, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, pp. 265–66). Although not explicitly required under the *Indian Act*, the practice of the Department of Indian Affairs at the time was to substantiate the consent of the band into which a person proposed to transfer using a Consent to Transfer form.

Peepeekisis Band."[461] Although McLean stated that the consent was approved, he explained that it would be necessary "to obtain and forward to the Department the consent of Peepeekisis Band to admit this boy into membership with them."[462] On December 28, 1897, McLean wrote to Graham informing him of the consent form received from Keith and requesting that Graham obtain the consent of Peepeekisis Band "to receive the boy into membership and forward the same to the Department."[463] On January 17, 1898, Graham wrote to the department Secretary enclosing "the Consent of Peepeekesis Band to admit 'Jose Kah-kee-key-ass' as a member."[464] The Consent to Transfer form is not on the record, so its date is unknown. On March 15, 1898, the department wrote to Graham to inform him that "the 'Consents' of both Bands having been received, the department approves of the transfer of Jose Kah-kee-kay-ass."[465] In his report of September 2, 1898, Graham explained that "Jose Ka-ke-ka-ass" had been discharged from school a year previously and had been residing on the reserve ever since. He had built a home and was married to a school girl[466] (Agnes Kamiyapit from One Arrow Band Duck Lake Agency).[467]

What the panel gathers from this portion of the record is that the first graduate, Joseph McNabb, arrived on Peepeekisis reserve in or around the fall of 1897, although the consent of the Peepeekisis Band is not sought until at least early January 1898. As noted above, McNabb was listed in Indian Commissioner Laird's 1902 Annual Report, along with George Little Pine, as having

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[461] J.D. McLean, Secretary, Department of Indian Affairs, to H. Keith, Indian Agent, Carlton Agency, November 22, 1897, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, p. 267).

[462] J.D. McLean, Secretary, Department of Indian Affairs, to H. Keith, Indian Agent, Carlton Agency, November 22, 1897, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, p. 267).

[463] J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Indian Agent, File Hills Agency, December 28, 1897, NA, RG 10, vol. 3983, file 163969, reel C-10201 (ICC Exhibit 1, p. 269).

[464] W.M. Graham, Indian Agent, File Hills Agency, to Secretary, Department of Indian Affairs, January 17, 1898, NA, RG 10, vol. 3983, file 163969 (ICC Exhibit 1, p. 277).

[465] A.W. McNeill, Assistant Secretary, Department of Indian Affairs, to W.M. Graham, Indian Agent, File Hills Agency, March 15, 1898, NA, RG 10, vol. 3983, file 163969, reel C-10201 (ICC Exhibit 1, p. 278).

[466] W.M. Graham, Indian Agent, File Hills Agency, to Indian Commissioner, Department of Indian Affairs, September 2, 1898, NA, RG 10, vol. 1400 (ICC Exhibit 1, p. 293, transcript p. 286).

[467] W.M. Graham, Indian Agent, File Hills Agency, to Secretary, Department of Indian Affairs, April 13, 1898, NA, RG 10, vol. 1400 (ICC Exhibit 1, p. 280).

"started in three or four years ago."[468] The information before the panel regarding George Little Pine shows that, although he "started in" in 1898 or 1899, he did not become a band member of Peepeekisis until 1903.

The time lag between McNabb's arrival and his formal transfer into the Band is relatively short, although not insignificant. As more graduates arrived, it would appear that even less attention was paid to the fact that they were now living on the reserve for lengthy periods without the consent of the Band and the Superintendent General.

In particular, Indian Commissioner Laird's October 1902 Annual Report explains that the File Hills Scheme has been "fairly successful" and that "some fifteen ex-pupil lads have been located" on the subdivided lots making up the Scheme. Discussion surrounding the first subdivision of lands for the purposes of the File Hills Scheme in Peepeekisis began early in the spring of 1902 and was completed in June 1902. Laird's October 1902 Annual Report uses Graham's report from August of that year to list the names of the graduates who were established within the Scheme.

Laird's report states that at least Ben Stonechild, Fred Dieter, and Francis Dumont had all started work on their farms "a year ago" – in other words, in 1901.[469] Further, John R. Thomas is listed as having started in May 1902, about one month before the first subdivision, and Alex Assinibis early in the spring of 1902, also before the first subdivision. In writing to McLean enclosing the Consents to Transfer for a group of 11 graduates, including Dieter, Stonechild, Thomas, and Assinibis, Assistant Indian Commissioner McKenna remarked that they have all "settled down in the File Hills Colony and it is advisable that they should be transferred to the Peepeekisis Band."[470] The Consent to Transfer forms of the Peepeekisis Band admitting Fred Dieter, Ben Stonechild, John R. Thomas, and Alex Assinibis are dated July 12, 1903. In the case of Dieter and Stonechild, this timing would mean they had been established in farming operations on

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[468] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[469] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[470] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, July 7, 1903, NA, RG 10, vol. 7111, file 675/3-3-10, vol. 2 (ICC Exhibit 1, p. 380).

Peepeekisis reserve lands at least two years before they became members of the Peepeekisis Band. In the case of Thomas and Assinibis, each was established on a farming operation at least one full year before becoming a Peepeekisis band member. Contrary to some evidence that Dumont transferred into the Band in 1903, his Consent to Transfer was dated June 17,1905, meaning he was farming Peepeekisis reserve lands for four years before transferring his membership.

A report in 1904 from Kate Gillespie, principal of the File Hills Boarding School, praising the success of ex-pupils Fred Dieter, Ben Assineawasis (Stonechild), and Roy Keewatin provides a valuable backdrop to Graham's Scheme from the vantage point of a disinterested third person:

> Apart from the training at the school, received in farming, each boy when he is sixteen or seventeen years old is allowed to choose for himself a farm in the colony that Inspector Graham has started for ex-pupils, and to put in on it, under the supervision of the government farm inspector, one or two summers' work. In this way by the time a boy leaves school he has made a very good start towards making a home for himself and also has an opportunity of getting acquainted with, and adapting himself to, the circumstances under which he will be labouring after he receives his discharge. I find this an excellent plan. The boy is aiming at something definite. The strongest inducement I can offer our boys to encourage them to do well is to promise them that when they prove themselves trustworthy, they may go out and work on their own farms.
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> ...
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> We have six ex-pupils and not one of them is a failure. We do not take all the credit for this. Inspector Graham's system, in his colony, deserves a very large share of it.[471]

What the panel has found from the facts is a disturbing pattern of non-band members arriving into Peepeekisis and establishing themselves with homes and farms well before – in some cases years before – the Peepeekisis Band provided its consent to the transfer of these individuals into the Band. The First Nation sums up the above facts in its written argument:

> Under provisions within the *Indian Act* as well as treaty, the Peepeekisis Reserve is set apart for the use and benefit of its members. What is clear from a review of the

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[471] Kate Gillespie, Principal, File Hills Boarding School, to the SGIA, August 30, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 345–46 (ICC Exhibit 1, pp. 413–14).

> historical record is that beginning in 1898, Graham began to bring non-band members onto the reserve and to include them within the Colony.[472]

In particular, says counsel for the First Nation, the panel should consider that "first people were brought onto the land, and that was before the First Nation was given any opportunity to determine membership or to determine whether they should be entitled to use the land."[473]

Canada approaches the legality of bringing non-band members to the reserve by pointing out that Treaty 4 had "no provision regarding the administration of band membership" and that, at the time of treaty negotiations, "band groupings were fluid" and "the Crown respected the Indians' own delineations of band membership, which is also consistent with the later *Indian Act* provision requiring consent of the band for membership transfer."[474] When asked by the panel if consent of the Band was required at the point that a graduate moved onto the reserve, Canada's counsel conceded that she was

> *unaware of any authority for those moves onto the reserve prior to formal transfer*, although it was – it was not uncommon for members of First Nations to move between reserves rather freely prior to ... the legalities being taken care of, so while there's no particular authority for that, it was not an uncommon practice, and I don't think it would have been considered out of the ordinary.
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> ...
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> I would also suggest that for ... Canada's officials to bring other members of other bands onto the reserve and to never get the consent of the band, to never ... legalize that situation, that also would be problematic. ... that's not the situation we're faced with here, but *I don't find it particularly problematic that there was some period of years prior to the formalization of those transfers.*[475]

Canada's acknowledgment that no statutory authority existed for Graham to bring non-band members onto the reserve is important for the resolution of this claim. Further, not only is there no express authority for bringing non-band members to live on a reserve but the *Indian Act* makes it clear that an Indian who has settled, resided, or occupied the land of a reserve without first becoming a member of the band is illegally in possession of that land unless that person has obtained permission from the Superintendent General.[476] Yet there is no evidence in the record that individual permissions from the Superintendent General were obtained by Graham as each graduate moved onto the reserve.

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[472] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 83.

[473] ICC Transcript, April 3, 2003, pp. 59–60 (Thomas Waller, QC).

[474] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 86.

[475] ICC Transcript, April 3, 2003, pp. 117–19 (Uzma Ihsanullah). Emphasis added.

During the oral hearing, the panel asked Canada's counsel how Canada would make the distinction between a person arriving on the Peepeekisis reserve as a "squatter" and those who were band members from other bands arriving at Peepeekisis in the circumstances of this claim. Canada's counsel answered that, "if that situation was allowed to exist indefinitely, it certainly would be disregarding the provisions of the [A]ct. The fact that these individuals became band members within relatively short periods of time resulted in a conformity with what was intended."[477]

In assessing the Crown's decision to start placing non-band members on the reserve, we have taken into consideration Canada's argument that its officials intended to legalize in future the occupation by non-band members, and also that officials originally had hoped that members of the other three File Hills Bands would settle at Peepeekisis legally through amalgamation of the four bands. We recognize as well that it was useful to the Crown to try out the graduates on the reserve before proposing their membership, and, lastly, that it was not uncommon for the occasional person from another band to settle on the reserve of a different band with that band's acquiescence.

Yet, it is patently clear that Graham ran roughshod over the legal rights of the Peepeekisis Band, as expressed in the *Indian Act*, by personally bringing these young Indian graduates from other reserves onto the Peepeekisis reserve with no prior consent from the Band to their becoming members or permission from the Superintendent General. Presuming that Crown officials had knowledge of the requirements of the *Indian Act*, Graham's actions, and the approval by headquarters' officials of Graham's approach, were a breach of the *Indian Act*. They also raise the prospect that the Crown breached its fiduciary obligation to the Band through its intentional disregard of the statute.

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[476] *Indian Act*, RSC 1886, c. 43 s. 21, as amended by SC 1894, c. 32, s. 2.

[477] ICC Transcript, April 3, 2003, pp. 164–65 (Uzma Ihsanullah).

Subdivision of the Peepeekisis Reserve into Farming Plots

An integral component of the development of the File Hills Scheme was the subdivision of portions of the Peepeekisis reserve, the first in 1902 and the second in 1906. Both subdivisions were actively promoted by Indian Commissioner Laird, who stated in 1902 that subdividing the reserve would further encourage this already successful experiment of the colony system.[478] The 1902 subdivision, as discussed in the Historical Background, resulted in approximately 7,680 acres (12 square miles) of the southeast part of the reserve being subdivided into 96 lots of approximately 80 acres each. The rationale for creating lots on the reserve was to furnish each graduate with his own farming plot and to formalize the right of each graduate to occupy one or more lots through the issuance of Location Tickets.

A second subdivision took place in 1906 because, by then, according to Graham, "all the good farming plots in the File Hills Colony [were] about taken up."[479] Initially, the department wanted to see the amalgamation of the four bands proceed before approving a second subdivision. Secretary McLean, in particular, stressed this pre-condition in a letter to Laird, cautioning that a second subdivision would entail a tract "of nearly the whole of the remainder of the Peepeekisis Indian reserve."[480] When his repeated attempts to obtain the four bands' approval to amalgamate proved fruitless, however, Graham told his superiors that the second subdivision should proceed because he could not "insist on men remaining in the Colony and farming inferior lands when there is better just outside the Colony that they have an equal right to."[481] In the spring of 1906, Indian Commissioner Laird noted his belief that the subdivision of the reserve would place all band members in a better position:

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[478] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[479] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to Secretary, Department of Indian Affairs, March 9, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 456).

[480] J.D. McLean, Secretary, to David Laird, Indian Commissioner, March 21, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 458).

[481] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to David Laird, Indian Commissioner, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

> As there is no immediate prospect of the amalgamation desired by the Department being agreed to by the four bands concerned, I am inclined to support Mr. Graham's recommendation that an additional tract of Peepeekesis reserve be laid out in farming plots. Even Indians of that band who are not ex-pupils of any School would be placed in a better position by being located on surveyed lots.[482]

The department agreed to the proposal, but on condition that the new allotments be confined to Peepeekisis band members or those formerly admitted as members.[483] It is evident from the department's correspondence that Graham's superiors, if not Graham, were becoming concerned about the propriety of situating non-band members on subdivided lots.

The second subdivision, in 1906, resulted in 120 lots of approximately 80 acres each and 12 lots of approximately 130 acres each. Slightly over 70 per cent of the total amount of reserve land, or 18,676.80 acres out of 26,624 acres, was by then subdivided and being used for the purpose of the farming Colony.[484]

Were the actions of the Crown in subdividing the majority of the Band's reserve into farming plots permitted by Treaty 4 or the *Indian Act*? Treaty 4 contains neither a specific provision for the subdivision of reserve land nor, as Canada notes, a general provision regarding its administration.[485] Under the 1886 *Indian Act*, however, the Superintendent General had the unilateral discretion and authority to survey and subdivide reserves:

> The Superintendent General may authorize surveys, plans and reports to be made of any reserve for Indians, showing and distinguishing the improved lands, the forests and lands fit for settlement, and such other information as is required; and may authorize the whole or any portion of a reserve to be sub-divided into lots.[486]

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[482] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, April 4, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 460).

[483] J.D. McLean, Secretary, to W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, May 8, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 465). See also J.K. McLean, Surveyor, Department of Indian Affairs, to DSGIA, April 12, 1906, NA, RG, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 462).

[484] This calculation was derived from two sources: Order in Council PC 1151 (setting aside 41.6 square miles, or 26,624 acres of land, in 1887) and CLSR T-700 (plan of subdivision of part of Peepeekesis IR No. 81, surveyed by J.L. Reid, CLS, 1903, and J.K. Mclean, DLS, 1906).

[485] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 87.

[486] *Indian Act*, RSC 1886, c. 43, s. 15.

This provision remained the same in the 1906 *Indian Act*.[487]

The First Nation points out that "there is no evidence to suggest that the members of the Peepeekisis First Nation were, in any fashion, consulted by Graham or any other representative of the Department as to whether a subdivision of their reserve should be undertaken."[488] It would have shown respect to have consulted with the Band before the decisions to subdivide its reserve lands; nevertheless, the Crown was under no statutory obligation to do so. With no evidence on the record to suggest that the Crown did not comply with the statute, the panel concludes that the subdivisions of 1902 and 1906, when considered in isolation, were within the authority of the Superintendent General to approve, with or without the consent of the Band.

Allocation of Peepeekisis Reserve Land to Industrial School Graduates

The allocation of plots of land to the graduates by Indian Agent William Graham was a critical step in the development of the File Hills Colony Scheme. The basic facts are not in dispute. From late 1897 on, graduates arrived at the reserve and occupied reserve land on which to farm. After the first subdivision in 1902, graduates were allocated subdivided lots of land. There is no evidence that the Band provided any consent to the allocation of land to individuals before 1911. In 1911, when the Band entered into the Fifty Pupil Agreement, the Crown obtained the sole authority to bring future graduates onto the reserve as members of the Band and to locate them on lots.

The question of providing Location Tickets to the occupants of the Colony was raised during the 1911 meetings concerning the Fifty Pupil Agreement. Graham, by then Inspector of Indian Agencies but still actively involved in the Scheme, wrote: "Will you be good enough to let me have a sample copy of the land location tickets that are usually issued. The question of land titles came up at the meeting."[489] Yet there is no evidence that Location Tickets were issued to the occupants at any time before or after 1911. As the First Nation points out, Secretary McLean apparently forwarded

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[487] *Indian Act*, RSC 1906, c. 81, s. 20.

[488] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 45(m).

[489] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, July 24, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 518).

Location Ticket forms to Graham,[490] but "these forms do not appear to have been utilized by Graham in the operation of the Colony."[491]

The analysis of the Crown's legal obligations to the Peepeekisis Band in the allocation of reserve land concerns two categories of graduates: those who were allocated land but were not yet band members; and those who were allocated lots after becoming band members. Both groups lacked band consent to the allocation (or approval of the Indian Commissioner if the allocation was 160 acres or less).

Did the Allocations Breach the Treaty?

Treaty 4 is silent with respect to the allocation of Peepeekisis reserve land to individual band members for farming purposes. The treaty, however, speaks to the ownership of band assets as a collective and communal ownership. The Indian parties to the original treaty document were the Cree and Saulteaux *Tribes* of Indians, identified by the signatures of the Chiefs representing individual bands. The selection of reserves was to follow a "conference *with each band of the Indians*."[492] With the possible exception of the consideration for the contract promising cash, coats, and other articles, depending on rank, to individual members of the band, most references to Indians are references to the collectivity. Any disposition of reserve land, for example, would require the consent of the group, not the individual occupying the land. The treaty also stipulates that agricultural implements would be provided to the band.

In July 1912, the department received a letter from Shave Tail, who wished to assume his deceased father's place as Chief of the Peepeekisis Band. The panel finds Shave Tail's letter particularly compelling, as it reveals his understanding of what was taking place with respect to the File Hills Scheme and his place within Treaty 4. He wrote:

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[490] J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Inspector of Indian Agencies, July 28, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 521).

[491] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 45(gg).

[492] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 5 (ICC Exhibit 8, pp. 1–13). Emphasis added

> Regarding my Chiefship, I mean to take my deceased father's place as a Chief for Pe-Pe-Kissis band. I thought it is not worth while to see Inspector Graham regarding this matter, because I know he won't listen to me. I was asking you knowing that you been the Head Man for those things and yet I am asking you same question.
>
> If you cannot get me the position I intend on leaving the Reserve and go to another because I don't own anything in my reserve, specially when Graham is here. I can't get no help of any kind from Graham. I had built a good house on my quarter and brook [sic] about 40 acres and Graham took this farm for his own use. Therefore I am out of farm and [have] no means to restart myself again.
>
> *It is a funny way when I see parties not been in treaty are farming on our Reserve and treated better and helped by* ... [page ends] I hope you will do all you can to help me and do what you [can] for me.[493]

Did the Crown breach the treaty in allocating plots of reserve land to non-band members? The First Nation argues that, according to the jurisprudence, the interest of an Indian in his or her reserve is a communal one and "the allocation of land within a reserve, except in accordance with processes set out in the *Indian Act* is illegal and, if carried out by Departmental officials, represents a violation of treaty rights."[494]

Canada appears to agree with the First Nation's contention that the treaty as a whole points to a collective interest when it states that there were no "terms which suggest that there was any individual entitlement to receive reserve land. Individuals were only counted as part of the collective entitlement. The reserve belonged to the band."[495] Canada, however, provides no rebuttal to the allegation that it breached the treaty by creating individual interests through the allocation of lots other than to suggest that the evidence does not support the First Nation's allegations.[496]

In the panel's view, one of the clear goals of the File Hills Scheme was, as explained by Indian Commissioner Laird, "to separate the most promising graduates of the schools from the down-pull of the daily contact with the depressing influence of those whose habits still largely pertain to savage life."[497] Treaty 4 contemplated the setting aside of a reserve comprising one square mile for each family of five and the disposition of reserve land only with band consent. The treaty also recognized that, although a band would be encouraged to pursue the practice of agriculture, the Indian signatories were free to choose whether their bands would do so. In other words, they could not be compelled to become farmers on their own reserve. The consequence of the Scheme, however, was to change fundamentally the way in which the Peepeekisis Band used its assets so that it no longer held the majority of its land as a collectivity. The Scheme effectively removed the freedom of choice to maintain any semblance of a traditional life, enshrined in Treaty 4, when the majority of the reserve land became subdivided and allocated to individuals who, with the possible exception of a few *original* band members,[498] formed a distinct entity from the one that signed Treaty 4.

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[493] Shave Tail to J.D. McLean, Secretary, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 549–50). Emphasis added.

[494] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 70.

[495] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 88.

[496] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 91.

Although the words of Treaty 4 do not explicitly envisage a case in which the Crown itself would start allocating portions of the reserve to Indians from other bands, the treaty should be read with reference to the *Indian Act* that was in force at the time.[499] As we have discussed, this Act included a number of strict provisions governing allocations of land on a reserve. We conclude that, at the very least, the Crown's actions were designed, in furtherance of the Scheme, to transform the Band's collective interest in land to primarily an individual interest. In this objective the Crown was successful, but such actions totally disregarded a vital principle of Treaty 4 – the preservation of the Band's right to collectively decide on the disposition of its land.

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[497] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[498] These band members were Alphonse Oskipas, Shave Tail's brother, Ernest Goforth, and Edwin Nokusis. For Alphonse Oskipas, see William Graham, Indian Agent, File Hills, to unidentified recipient, September 2, 1898, NA, RG 10, vol. 1400 (ICC Exhibit 1, pp. 292–93, transcript pp. 285–86); for Shave Tail's brother, see Reverend Hugonard, Qu'Appelle Indian Industrial School, to the Secretary, Department of Indian Affairs, June 7, 1915, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 571); for Ernest Goforth, see David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369); and for Edwin Nokusis, see ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 305, Daniel Nokusis).

[499] For a recent statement of this principle, see *Kingfisher v. Canada*, [2002] FCA 221, paras. 5 and 6.

Allocations under the Indian Act

We now turn to the legality of the Crown's allocations of land under its own governing legislation, the *Indian Act.*

Section 16 of the 1886 *Indian Act* sets out the allocation requirements enabling an individual Indian to possess land lawfully on a reserve:

> **16**. No Indian shall be deemed to be lawfully in possession of any land in a reserve, unless he has been or is *located* for the same by the band, or council of the band, with the approval of the Superintendent General; but no Indian shall be dispossessed of any land on which he has improvements, without receiving compensation therefor, at a valuation approved by the Superintendent General, from the Indian who obtains the land, or from the funds of the band, as is determined by the Superintendent General.[500]

Section 16 was expanded by an 1890 amendment to include the following:

> **2.** Section sixteen of the said Act is hereby amended, by adding the following words at the end thereof: "Provided always, that prior to the location of an Indian under this section, the Indian Commissioner for Manitoba, Keewatin and The Western Territories may issue a *certificate of occupancy* to any Indian belonging to a band residing upon a reserve in the aforesaid Province, District or Territories, of so much land, (*in no case however to exceed one hundred and sixty acres,*) as the Indian, with the approval of the Commissioner selects; and such certificate may be cancelled at any time by the Indian Commissioner, but shall, while it remains in force, vest in the holder thereof, as against all others, lawful possession of the lands described therein.[501]

When the *Indian Act* was amended in 1906, section 21 of the new Act reproduced these requirements almost verbatim.[502]

In addition to amended section 16, section 17 spelled out in greater detail the process of issuing a Location Ticket once a band or band council had "located" an Indian of the band on reserve land and the Superintendent General had approved:

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[500] *Indian Act*, RSC 1886, c. 43, s. 16. Emphasis added.

[501] *Indian Act*, RSC 1886, c. 43, s. 16, as amended by RSC 1890, c. 29, s. 2. Emphasis added.

[502] See *Indian Act*, RSC 1906, c. 81, s. 21.

> **17.** When the Superintendent General approves of any location as aforesaid, he shall issue, in triplicate, a *ticket granting a location title* to such Indian, one triplicate of which he shall retain in a book to be kept for the purpose; and the other two of which he shall forward to the local agent – one to be delivered to the Indian in whose favor it was issued, and the other to be filed by the agent, who shall also cause the same to be copied into a register of the band, provided for the purpose.[503]

The comparable section in the 1906 *Indian Act* is the same for our purposes.[504]

Under these provisions, an Indian could be in lawful possession or occupancy of reserve land by allotment in one of two ways, either by a Location Ticket or a Certificate of Occupancy.[505] Further, the issuance of a Location Ticket required the consent of the band or band council, plus the approval of the Superintendent General. Once that approval was given, the Superintendent General was compelled to issue the Location Ticket. In the alternative, an Indian belonging to a band who had not been located on reserve land could request a Certificate of Occupancy for an area of 160 acres or less from the Indian Commissioner, who, in his discretion, could approve the occupancy without the consent of the band. The Commissioner could also cancel it at any time.

In a recent decision of the Saskatchewan Court of Queen's Bench, *Johnstone v. Mistawasis First Nation,*[506] the court reviewed the mandatory nature of the sections of the *Indian Act* dealing with allotment of reserve lands. The case concerned an application for an interim injunction to prevent the First Nation from forcibly removing the applicants from its reserve land. The court noted that the sections dealing with possession and occupancy of reserve lands as set out in the 1985 *Indian Act* represent a comprehensive legislative scheme. Section 20(1) of the 1985 Act, which is similar to the older versions, "prescribes two preconditions for a member of a band to be lawfully in possession of land in a reserve: (1) possession of the land must be allotted to the member by the Band

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[503] *Indian Act*, RSC 1886, c. 43, s. 17. Emphasis added.

[504] See *Indian Act*, RSC 1906, c. 81, s. 22.

[505] In 1951, possession of lands under the *Indian Act* became evidenced by the granting of a Certificate of Possession; all valid and subsisting Location Tickets issued previously were deemed to be Certificates of Possession. See *Indian Act*, RSC 1951, c. 29, s. 20.

[506] *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 (Sask. QB).

Council; and (2) the Minister must approve the allotment."[507] In the *Johnstone* case, the applicants had not received ministerial approval.

The court in *Johnstone* cited with approval the case of *Lower Nicola Band v. Trans-Canada Displays Ltd.*, which in turn relied on the judgment in *Joe v. Findlay*, a leading case on claims for possession and allotment of reserve lands. In the *Joe* case, the British Columbia Court of Appeal explained the effect of a similar section of the 1970 *Indian Act*:[508]

> *This right of the entire band in common may be exercised for the use and benefit of an individual member of the band by the band council, with the approval of the Minister*, allotting to such individual member the right to possession of a given parcel of reserve lands: see *Indian Act*, s. 20.
>
> The subsequent provisions of the statute relating to improvements on reserve lands and transfer of possession of reserve lands are consistent only with this right of use and benefit being exercised by the individual band member through an allotment to that individual band member of reserve land on the part of the band council, with the approval of the Minister. I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands which right is given by statute to the entire band in common but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown: *Brick Cartage Ltd. v. The Queen*, [1965] 1 Ex. C.R. 102. *In the absence of such allotment by the band council there is no statutory provision enabling the individual band member alone to exercise through possession the right of use and benefit which is held in common for all band members.*[509]

In addition, the court in *Joe* commented that the requirements of section 20(1) have been strictly enforced by the courts and that a band member could be in trespass if he or she possesses reserve land without the consent of both the band council and the minister. The court in *Johnstone* similarly concluded that "these cases show that claims for possession of reserve land by individual band members will be *strictly construed*, and must fall within the precise terms of the *Indian Act*."[510]

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[507] *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 at 126 (Sask. QB).

[508] *Indian Act*, RSC 1970, c. I-6, s. 20(1).

[509] *Joe v. Findlay* (1981), 122 DLR (3d) 377 at 379–80 (BCCA). Emphasis in *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 at 128 (Sask. QB).

In light of the jurisprudence to date, this panel finds the following facts to be relevant and significant. The Peepeekisis Band was without a recognized Chief or council from 1894 to 1935. The department's own records confirm this fact.[511] Moreover, there is no evidence on the record of any Location Tickets or Certificates of Occupancy having been granted for Peepeekisis reserve lands. Canada's own research conducted in its review of this claim confirms that no Location Tickets were found and that the record of the first Certificate of Possession, which replaced the Location Ticket system, issued for Peepeekisis reserve lands was in 1946.[512] Fred Dieter testified during the Trelenberg Inquiry that he was promised a Location Ticket when he arrived on the Peepeekisis reserve but was never issued one, nor was he aware of any such tickets having been issued to anyone at Peepeekisis.[513]

In its written submission, Canada argued:

> Although, the evidence in this case would indicate that no location tickets or certificates of occupancy were issued for those graduates who were placed on the subdivided portion of the reserve, this situation does not give rise to any damages on the part of the band as a collectivity. The subdivided land still forms part of the reserve and has been used by members of the band. Consent was not required for the subdivision or the allocations on plots up to 160 acres.[514]

During the April 3, 2003, hearing, the panel questioned Canada's counsel further on this point:

> Commissioner Dupuis: On which section of the act would the allocation of lots have taken place?

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[510] *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 at 128 (Sask. QB). Emphasis added.

[511] Violet Kayseass, Registration, Revenues and Band Governance, Department of Indian and Northern Affairs, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7).

[512] Specific Claims Branch, DIAND, "Evidence of Peepeekisis Location Tickets," February 20, 2001 (ICC Exhibit 3C, p. 5).

[513] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 166 (ICC Exhibit 6A, p. 174, Fred Dieter).

[514] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 108.

> Ms. Ihsanullah: I believe we discussed that earlier. That was under – I'm looking at the 1906 act under Section 21, the superintendent general had ... the authority to place ... people on lots of up to 160 acres.
> Commissioner Dupuis: And would issue a certificate of occupancy? Is that what –
> Ms. Ihsanullah: Yes.
> Commissioner Dupuis: So that this person can occupy this territory, but not exceeding 160 acres?
> Ms. Ihsanullah: That's the section I'm referring to.
> Commissioner Dupuis: Yes. So where would the certificates of occupancy be because if I recall well, there were no – were there any certificates of occupancy issued by the superintendent to these people coming in the Peepeekisis reserve?
> Ms. Ihsanullah: I'm not aware of any documentation in the record that would indicate such certificates were issued.
> Commissioner Dupuis: Would that mean that then the allocation of lots would ... not have been made in accordance with the provisions of the act?
> Ms. Ihsanullah: *Well I think that they're in accordance with the spirit of what's intended by that provision. It would appear that the actual paperwork was not done.*[515]

The panel has a number of concerns with Canada's interpretation of the *Indian Act* provisions relating to the issuance of Location Tickets and Certificates of Occupancy. First, the decision of the Indian Commissioner to issue a Certificate of Occupancy, considered a lesser interest than a Location Ticket,[516] was discretionary. By issuing a Certificate of Occupancy, the Commissioner could allow an Indian to occupy certain lands to the exclusion of all other members within a reserve of which that Indian was a band member. This certificate entitled "the holder thereof, as against all others, lawful possession of the lands described therein." Without the certificate, there was nothing for the individual Indian to "hold" to prove lawful possession, and there would be no description "therein" of what lands were being held. Yet it is apparent that no Certificates of Occupancy or Location Tickets were issued before the first Certificate of Possession in 1946.

Our second concern is that, although, as of 1890, amended section 16 allowed for allocations of 160 acres or less with the consent of the Indian Commissioner alone, the record shows that William Graham was making allocations well in excess of 160 acres and boasting of them as an accomplishment.[517] In these cases, the graduates who were admitted to the Band ought to have had Location Tickets based on band consent, as Certificates of Occupancy would not have been enough.

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[515] ICC Transcript, April 3, 2003, pp. 162–63 (Commissioner Dupuis, Uzma Ihsanullah). Emphasis added.

[516] ICC Transcript, April 3, 2003, pp. 168–69 (Uzma Ihsanullah).

It is unconscionable for Canada to argue that the allocations of land to the graduates were made in accordance with the spirit of the *Indian Act* provisions dealing with land allocations, and that the paperwork had simply not been done. The paperwork itself provides evidence of the lawful possession, whether by Location Ticket or Certificate of Occupancy, of the individual land holder.

We have noted that Graham brought graduates onto the reserve well before they became members of the Band and that he allocated land to them. As we have also observed, Graham's superiors, including one of the most senior officials on the file, Secretary J.D. McLean, began to be concerned about Graham's practice of allocating land to non-band members at the time that the proposal for a second subdivision was floated in 1906.

By then, however, the Scheme had been in place for some eight years, and none of Graham's superiors had tried to rein him in. On the contrary, departmental correspondence from the same year indicates that Graham's impatience was quickly rewarded. For example, Graham complained to Commissioner Laird in March about the department's request that an amalgamation of the File Hills Bands be obtained before any further subdivision of the reserve. Graham commented, "I am sorry that the matter is looked upon in this light by the Department," and proceeded to warn Laird that any further delay in the second subdivision could eventually cost the department money.[518] Graham persisted, however, and the department finally agreed to the subdivision, but on condition that the allotments be confined to members of the Band or to those who had been formerly admitted.

As a further observation on the department's condonation of Graham's actions, we refer to the 1905 letter from Indian Commissioner Laird to Secretary McLean illustrating that Laird was acutely aware that students were placed on reserve land for a trial period in order to prove themselves: Laird commented that the transfers of certain named students "for their final admission to the Colony were not asked for until Mr. Inspector Graham was satisfied that they would prove themselves to be good workers."[519] We have no hesitation in finding that, in spite of the concerns relayed by certain officials, in the end the department actively supported Graham's method of allocating land to the graduates.

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[517] W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, May 8, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 159 (ICC Exhibit 1, p. 481); W.M. Graham, Inspector of Indian Agencies, to unidentified recipient, c. March 31, 1911, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1911*, 519 (ICC Exhibit 1, p. 506).

[518] W.M. Graham, Inspector of Indian Agencies, Qu'Appelle Inspectorate, to David Laird, Indian Commissioner, March 31, 1906, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 459).

Our final remarks are in relation to the second part of section 16 in the 1886 *Act* (section 21 in the 1906 *Act*), providing that no Indian could be dispossessed of any land on which he had improvements without receiving compensation from the Indian who obtained the land or from the funds of the band. The Commission heard oral history evidence of the Peepeekisis elders that the "*original* members" of the Peepeekisis Band were slowly pushed to the northwest portion of the reserve as the lands committed to the Scheme expanded. The Commission also has on record the 1912 letter from Shave Tail stating that Graham took Shave Tail's farm and left him with no means of restarting. The panel accepts as a fact that at least some of the *original* band members were pressured to move, but there is no evidence to indicate that the Crown made any efforts to ensure that they were compensated, as required by the *Indian Act*, for the improvements they had made to their lands before the introduction of the Scheme.

In conclusion, in our view, one of the functions of the *Indian Act* is to protect the legal interests of the band in its reserve lands in not permitting unlawful possession by anyone, including Indians. In the case of a Location Ticket, the person had to be a member of the band[520] and have both the formal permission of the band council and the Superintendent General. In the case of a Certificate of Occupancy, the Indian Commissioner had to issue a Certificate of Occupancy to the band member, but could do so only if the parcel of land was 160 acres or less. The language of section 16 is mandatory. These sections have been construed narrowly by the courts; yet the Crown, in this claim, did not meet or even try to meet these statutory requirements.

As a result, the allocations to the graduates, be they band members or non-band members, contravened section 16 of the 1886 *Indian Act* (section 21, 1906 Act). There is no evidence that band consent was given, with the result that no Location Tickets were or could be issued. Also, no

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[519] David Laird, Indian Commissioner, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, July 21, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, vol. 1 (ICC Exhibit 1, p. 435).

[520] *Indian Act*, RSC 1886, c. 43, ss. 2, 22.

Certificates of Occupancy were issued; thus, the amendment to section 16 does not apply here. Even if the Indian Commissioner had issued the certificates, all the allocations of land over 160 acres would have been illegal.

Finally, we have no evidence that the *original* band members who were displaced as a result of the Scheme and who had made improvements on land in the Colony received compensation, as required by the statute.

Before leaving the topic of the Crown's statutory obligations, we wish to address briefly Canada's additional defence to the allegation that the Crown's allocations were in breach of the *Indian Act*. Canada argues that the 1911 Fifty Pupil Agreement, agreed to by the Band,

> *sanctions the allocations made up to that point*, and gave the Superintendent General full authority to make further allocations. The band members who attended the 1911 meetings would have been fully aware of the allocations of land which had been made up until that time. They consented to further allocations as long as the previous ones were not disturbed.[521]

At the oral hearing, however, Canada's counsel acknowledged that the 1911 Agreement did not have retrospective application: "[T]he agreement is really talking about what's going to happen in the future."[522] When asked how the Crown could legalize or correct the past occupation of the land by the graduates, counsel replied: "I'm not suggesting that there was some kind of authority for that period of time. I'm not aware of any authority that would be applicable to that."[523]

Counsel for the First Nation, in contrast, urged the panel to analyze the Scheme in its totality:

> [Y]ou should be looking at the scheme as a whole. We think that the admission of individuals in 1903 is part of the scheme. By 1905 or 1906 the individuals that were admitted in 1903 now effectively controlled the band. By 1911 that agreement [the Fifty Pupil Agreement] is simply the continuation of the overall scheme.
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> ...

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[521] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 106. Emphasis added.

[522] ICC Transcript, April 3, 2003, p. 148 (Uzma Ihsanullah).

[523] ICC Transcript, April 3, 2003, p. 165 (Uzma Ihsanullah).

> ... I don't believe that there's any evidence before this Commission that the band as a whole, the First Nation had approved the allocation of land prior to 1911.[524]

The panel agrees with the First Nation that the 1911 Fifty Pupil Agreement was simply a new stage in the implementation of the Scheme. The agreement was proposed by the Crown because, by 1910, the opposition to the farm Colony was growing not only among the *original* band members, now in the minority, but also the settled graduates. The Crown was having a harder time obtaining Consents to Transfer.[525] Thus, the primary motive for the 1911 Agreement was to cure for the future the growing problem of allocations and consents. If Canada is still of the view that this agreement could legalize past, illegal allocations by permitting the Superintendent General to make all future allocations unilaterally, the panel strongly disagrees.

The Crown was in fundamental breach of the *Indian Act* when it allocated Peepeekisis reserve land to the graduates.

Were the Allocations in Breach of the Crown's Fiduciary Obligation?

Graham's approach to allocating lots to graduates who were either non-band members or new members attracts the possibility that the Crown also breached a fiduciary obligation in this respect. Canada's counsel specifically addressed this question. In discussing the discretionary authority of the Indian Commissioner under the *Indian Act* to approve certain allocations without band consent, counsel stated that, if the official exercises his discretionary authority in a manner that breaches the law, in this case the *Indian Act*, it would not trigger a fiduciary duty:

> There has to be an interest at stake, and in terms of when you're speaking about reserve land, that's the interest, the interest in the reserve and Canada's duty to protect that interest from exploitation. There's no alienation of the interest in this situation ....[526]

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[524] ICC Transcript, April 3, 2003, pp. 83 and 85–86 (Thomas Waller, QC).

[525] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, October 18, 1910, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 502–3).

[526] ICC Transcript, April 3, 2003, p. 170 (Uzma Ihsanullah).

Canada has maintained throughout that the "interest," being the reserve, remained intact from the beginning to the end of the Scheme.[527] In other words, the reserve boundaries remained the same, the Band was still the Peepeekisis Band, and the legal interest was not alienated by means of surrender, expropriation, or through any other legal instrument.

The panel does not agree. In our analysis of the fiduciary obligation owed by the Crown to this First Nation at the time of the original decision to locate the Scheme on the Peepeekisis reserve, we concluded that the Crown intended to effect a "disposition" of this land in favour of the industrial school graduates by planning to "allot" portions of it to the graduates for their exclusive use and occupation. The Crown's decision in 1898 to change unilaterally the way in which the Peepeekisis Band, as it existed in 1898, used its reserve lands (from communal to individual land holdings) was followed by various actions to implement the Scheme, including the allocation of reserve lands to the graduates. Each of these allocations amounted to a *de facto* disposition of reserve land, and each disposition, in our view, affected the legal interest of the Band in its reserve.

The Crown's disposition of reserve lands through the illegal allocation of lots to individuals was a breach of the Crown's fiduciary duty to protect the Band's reserve from erosion, invasion, or destruction. We reiterate the reference in the *Wewaykum* case to Wilson J in *Guerin*:

> The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). ... Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.[528]

The interest of a band cannot remain unchanged as a result of the allocation of its land. This interest, as *Wewaykum* points out, is a legal, quasi-proprietary interest in the reserve. The case law[529] is also clear that this interest belongs to the band as a collectivity. The right of the band to use and occupy its reserve land is, therefore, a legal, collective right. A band itself may exercise the power to suspend this right by allocating some reserve land to individuals. If it should do so, the right to use and benefit from that land necessarily shifts from the band to the individual who is located on it. The band's legal interest in respect of its right to use and benefit from that land as a band is suspended indefinitely. For all intents and purposes, in this claim, the original Peepeekisis Band permanently lost its collective right to use and occupy the land allotted to the graduates.

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[527] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 156.

[528] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 100.

[529] *Opetchesaht Indian Band v. Canada*, [1998] 1 CNLR 134.

The obligation on the Crown to use ordinary diligence to protect the Band from the invasion of its quasi-proprietary interest could not have been met in this claim. The Crown itself chose not to inform and negotiate an arrangement with the First Nation respecting the allocation of lots. It implemented the allocations without band knowledge and without band consent. As a result, the Band's legal interest was unilaterally changed, in clear breach of the Crown's fiduciary duty.

In our estimation, the allocation of lots to the graduates was the most egregious aspect of the Crown's implementation of the farm Scheme. The Crown had two other choices, either to find other non-reserve land for the Scheme or to follow the law in every respect before imposing its experiment on the Peepeekisis Band. By exercising ordinary diligence, the Crown could easily have prevented a serious breach of its fiduciary obligation to this Band.

Special Assistance Provided to Industrial School Graduates

The parties agree, and the record indicates, that the graduates received greater assistance from the Indian Agent than the *original* members of the Peepeekisis Band who were farming outside the Colony. The question before the panel, therefore, is whether the Crown breached a lawful obligation to the Peepeekisis Band by providing such assistance to individual farmers in the Colony.

Treaty 4 provided for one square mile for each family of five (or in that proportion for larger or smaller families). It also promised certain agricultural implements and seed for those bands that were actively cultivating the soil, or would be in future, in order to encourage the practice of agriculture among the Indians.[530]

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[530] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Exhibit 8).

The record indicates that at least some of these agricultural provisions were provided to the Peepeekisis Band. In his report of May 1883, T.P. Wadsworth, the Inspector of Indian Agencies, noted that Chief Peepeekisis' Band had 13 houses and three stables, and that the Chief had asked for more cattle and shoes for himself and his people.[531] Inspector Wadsworth explained that, in addition to cultivating "old land," the four File Hills Bands had broken 15 acres of new land and it was his opinion that the Peepeekisis Band would "far surpass any other in this section before very long."[532] Indian Agent John Nicol's May 1884 correspondence explained that the Peepeekisis Band had only one yoke of oxen for a group of over 130 people.[533] It would appear that the Peepeekisis Band began to pursue agricultural operations and was doing well.

There is no evidence to suggest that the Crown breached the terms of Treaty 4 in the provisions of farming assistance generally. Nor do there appear to be any sections of the *Indian Act* that address this particular set of facts. The only question, therefore, is whether the Crown breached a fiduciary obligation to the Band in the manner in which it meted out assistance to those farming in the Colony. In particular, did the Crown give preferential treatment to the graduates in the form of financial or other assistance that was not available to those outside the Colony and, if so, was it at the expense of the latter group?

Beginning in 1898, Graham began reporting on his success in establishing industrial school graduates in farming operations on Peepeekisis reserve. He wrote to the department's Secretary on January 25, 1899, that he had "settled on the Reserves here four ex pupils who have prepared in all about 75 acres for crop. As these young men have worked hard ever since they settled here building houses, stables, plowing land, etc. at no expense to the Department I trust you will see fit to supply them with seed grain for next spring."[534] He does not name the four graduates he is speaking of;

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[531] T.P. Wadsworth, Inspector of Indian Agencies, Department of Indian Affairs, to E. Dewdney, Indian Commissioner, Department of Indian Affairs, May 30, 1883, NA, RG 10, vol. 3640, file 7452-1 (ICC Exhibit 1, p. 52).

[532] T.P. Wadsworth, Inspector of Indian Agencies, Department of Indian Affairs, to E. Dewdney, Indian Commissioner, Department of Indian Affairs, May 30, 1883, NA, RG 10, vol. 3640, file 7452-1 (ICC Exhibit 1, p. 52).

[533] J. Nicol, Farming Instructor, to the Indian Commissioner, May 5, 1884, NA, RG 10, vol. 3687, file 13642 (ICC Exhibit 1, p. 63, transcript p. 61).

[534] W.M. Graham, Indian Agent, File Hills Agency, to Secretary, Department of Indian Affairs, January 25, 1899, NA, RG 10, vol. 1400, p. 670 (ICC Exhibit 1, p. 298, transcript p. 297).

however, he does list the names of four graduates in a previous letter[535] – Alphonse Oskipas, Jose Ka ka ka ass (Joseph McNabb), a young man with the last name of Desnomie, and John Bellegarde. The panel finds it is more probable than not that these are the same four young men for whom Graham requested the seed grain. McNabb had been admitted into the Peepeekisis Band by this time; Oskipas was an *original* Peepeekisis band member first paid on his own ticket in 1898;[536] Bellegarde was originally from Little Black Bear's Band;[537] and Desnomie was in fact William Desnomie, son of Louie Desnomie, who was transferred into the Band in 1885, before Graham's arrival.[538]

As can be seen from the record, the department began a program whereby it would provide assistance to industrial school graduates if they began farming operations. It is clear that, in most instances, the industrial school graduates did receive some assistance to begin their farming operations within the File Hills Scheme. Graham wrote to the Superintendent General in 1901 to request a share of this financial assistance:

> I understand that provision is to be made to assist ex-pupils residing on Reserves to start farming. I would ask that a share of this money be granted to me to assist these young people. I have a number of pupils who are doing well, but I feel satisfied that better results could be obtained if they were given a start by the Department.[539]

In response, Secretary McLean wrote to Indian Commissioner Laird to explain that, "of the $2000.00 which has been placed in the estimates to assist ex-pupils residing on the reserves to start farming, the greater part, namely, $1500.00, will be made available for Mr. Graham, when sanctioned by

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[535] W.M. Graham, Indian Agent, File Hills Agency, to unidentified recipient, September 2, 1898, NA, RG 10, vol. 1400, pp. 482–83 (ICC Exhibit 1, pp. 292–94, transcript pp. 285–87).

[536] Treaty annuity paylist, Peepeekisis Band, 1898, NA, RG 10, vol. 9431 (ICC Exhibit 3E, p. 74).

[537] Consent to Transfer Form, June 17, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, part 2 (ICC Exhibit 1, p. 427).

[538] See treaty annuity paylist, Peepeekisis Band, 1885, NA, RG 10, vol. 9418 (ICC Exhibit 3E, p. 6g), and treaty annuity paylist, Peepeekisis Band, 1897, NA, RG 10, vol. 9430 (ICC Exhibit 3E, p. 65).

[539] W.M. Graham to the SGIA, February 4, 1901, NA, RG 10, vol. 3878, file 91,839-7 (ICC Exhibit 1, p. 304).

Parliament, to enable him to assist such pupils in his Agency."[540] In his 1902 Annual Report, Laird explained that the 15 "ex-pupil lads" who had been located on subdivided lots in the File Hills Colony

> were assisted by being given horses, ploughs, harrows and some lumber and hardware for houses, *the greater part of the value of which it is proposed they shall pay back* to the department when their crops warrant it, the money to be used to help others make a like start.[541]

The assistance program for graduates of industrial schools to begin farming was nation-wide and not limited to the File Hills Scheme. In his report on Indian affairs in Manitoba and the North-West Territories for 1902–3, Laird stated: "[W]e have advanced a point in making the experiment with the File Hills colony. I am glad to say that this has so far not been a disappointment. Other ex-pupil boys have also been started on several reserves, and, besides, there are a number of graduates scattered over the country, some ranching in treaty No. 7, others farming along the Saskatchewan; others acting as teachers."[542] In addition, given the following evidence, it is apparent that the policy included an understanding that ex-pupils were to repay this assistance once they were financially able.

In 1905, Laird reported that "[t]hese ex-pupils, with one exception or two, were helped by the department to make a start, the greater portion of the help being on the loan principle, that is, the horses, cattle, or articles given them are to be repaid in four years. With the splendid crops of this season, the oldest members of the colony will be able this autumn to pay off their debts not only to the department but to outsiders."[543] This arrangement is corroborated by an article in the *Ottawa Journal* in 1917 about William Graham's experiment at "the File Hills Reservation," the author stating that the "Government advances him the price of a yoke of oxen, ploughs and harness. This is repayable in four years. There has been no difficulty in having the advances repaid."[544]

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[540] J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, Department of Indian Affairs, March 2, 1901, NA, RG 10, vol. 4951 (ICC Exhibit 1, p. 310, transcript p. 308).

[541] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369). Emphasis added.

[542] David Laird, Indian Commissioner, to the SGIA, October 30, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 239 (ICC Exhibit 1, p. 401).

[543] David Laird, Indian Commissioner, to Frank Pedley, DSGIA, October 14, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 194 (ICC Exhibit 1, p. 455).

By 1910, Graham was reporting on the "Colony for ex-pupils" as follows:

> These young Indians have acquired, since starting up, a great many valuable horses and a full line of machinery, *which has been paid for by themselves*. ... They have also 14 yoke of cattle, *which were loaned by the department originally, and in many cases paid for already*. They own 22 wagons, 42 ploughs, 13 binders, 10 seeders, and a great deal of other farm machinery, *which has all been paid for out of proceeds of crop* sold from time to time.[545]

It is also apparent that there were four *original* Peepeekisis band members who were themselves industrial school graduates – Alphonse Oskipas,[546] Shave Tail's brother,[547] Ernest Goforth,[548] and Edwin Nokusis.[549] According to the evidence, Oskipas, Shave Tail's brother, and Goforth farmed in the Colony. Edwin Nokusis also farmed for a short time before joining the army, but it is unclear where on the reserve. Nokusis and Goforth apparently received some farming assistance, but the record is silent on any assistance to Oskipas or Shave Tail's brother.

The panel and the parties agree that special assistance went to the graduates in the Colony as part of the government's policy to assist industrial school graduates across Canada. The panel finds, as well, that the recipients of assistance under the ex-pupil farming policy were expected to pay back most, if not all, of the benefit. This means that the assistance, possibly including the $1,500, was considered to be in the nature of a loan, not a gift. In addition, the evidence discloses that, as time went on, the graduates purchased their own farm machinery and horses and paid back the original loans. Apart from Shave Tail's complaint, the lack of evidence on this subject makes it impossible to determine to what extent, if any, financial assistance in the form of gifts not available to those outside the Colony was provided to this group. Based on the evidence before us, we cannot find a breach of fiduciary obligation to the Band arising out of the special assistance provided to the graduates.

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[544] S.J.M., "Canada's Indians and the War: Fighting and Contributing Money," *Ottawa Journal*, February 27, 1917, p. 4 (ICC Exhibit 1, p. 582).

[545] W.M. Graham, Inspector of Indian Agencies, File Hills Agency, to Frank Pedley, DSGIA, March 31, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1910*, 416 (ICC Exhibit 1, p. 495). Emphasis added.

[546] William Graham, Indian Agent, File Hills, to unidentified recipient, September 2, 1898, NA, RG 10, vol. 3400 (ICC Exhibit 1, pp. 292–93, transcript pp. 285–86).

[547] Reverend Hugonard, Qu'Appelle Indian Industrial School, to the Secretary, Department of Indian Affairs, June 7, 1915, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 571).

[548] David Laird, Indian Commissioner, to the SGIA, October 15, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 189 (ICC Exhibit 1, p. 369).

[549] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 305, Daniel Nokusis).

Transfers of Membership of the Graduates and the Defence of *Res Judicata*

Background

Throughout the history of the File Hills Scheme – from 1898, when Joseph McNabb was formally admitted to the Peepeekisis Band, to the 1930s, when the admissions of ex-pupils ceased – industrial school graduates who had been located on the reserve by William Graham made applications at different times to join the Band. The first group to be admitted by Consents to Transfer, after Joseph McNabb, numbered 11 individuals in 1903, one year after the first subdivision. They were followed by a trickle of individuals until another group of six obtained memberships in 1908, two years after the second subdivision. By 1908, 22 of the 37 male members potentially entitled to vote on band affairs were industrial school graduates. In 1909, four more graduates transferred into the Band, but, by 1910, opposition was growing, both within and outside the Colony, to accepting more newcomers onto the increasingly crowded farmland in the Colony. In 1911, members of the Peepeekisis Band signed an agreement proposed by the Crown that would give the department the unilateral right to transfer up to another 50 graduates to the Band and to locate them on any quantity of land, anywhere on the reserve. This agreement provided for a payment of $20 to each band member, or $3,000 in total.

In summary, the ongoing arrival of graduates took place before their formal transfers into the Band. These transfers occurred over several years. Once graduates became band members, they ceased to have rights in their former bands and gained all the rights of a Peepeekisis band member, including the right to vote and rights as part of the collective to reserve land. The right to vote became a critical issue, as many of the Consents to Transfer were approved by a majority of transferred members and, as early as 1905, some Consents were signed exclusively by transferred members.

Between 1911 and 1944 the historical record reveals that at least 17 male graduates arrived at the farming Colony and were transferred into the Peepeekisis Band. There was also the occasional formal complaint about the Indian Agent's authority to transfer an individual and, in one case, some individuals asked how they had become Peepeekisis members without their knowledge. From the public's perspective, however, the experiment was considered a success in farming and in keeping Indian graduates from returning to their "primitive conditions" – words used by the *Ottawa Journal* in 1917.[550]

The investigations into the Peepeekisis Band membership, set out in greater detail in the Historical Background, began in 1945 when the Superintendent of Reserves and Trusts, D.J. Allan, in a memorandum to file, questioned the unusually high increase in band population from 66 to 365, compared to a decrease from 72 to 60 at Little Black Bear Band in the same period.[551] The first response to Allan's request for information came back in the form of two lists, the first showing *original* members of the Band, and the second showing Indians who were admitted to the Band and whose status was considered doubtful.[552] The current Agent at File Hills, S.H. Simpson, was then asked to investigate further "the manner in which they [the names on the second list] were admitted."[553] It is important to note that the genesis of the investigations by the Department of Indian Affairs was a concern over the correctness of certain band memberships and nothing else.

This preliminary phase led to three separate investigations. The first, in 1947, was led by Malcolm McCrimmon, Chief of Statistics and Membership and later Registrar for the Indian Affairs Branch. He was given the mandate to "make an investigation into all questions of Band membership in the File Hills Agency, Province of Saskatchewan, as provided by Section 18 of the Indian Act."[554] McCrimmon's work was put on hold because of an anticipated national survey of Indian membership, but, soon afterward, Ernest Goforth and other *original* members, on their own[555] and through their lawyer Morris Shumiatcher,[556] began to press the government for a royal commission into the problem of band membership. It is clear that, by now, officials were considering the possibility that there were serious irregularities in the Peepeekisis membership.

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[550] S.J.M., "Canada's Indians and the War: Fighting and Contributing Money," *Ottawa Journal*, February 27, 1917, p. 4 (ICC Exhibit 1, p. 582).

[551] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, July 27, 1945, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 613).

[552] J.P.B. Ostrander, Inspector of Indian Agencies, Saskatchewan, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, March 21, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, pp. 614–19).

[553] J.P.B. Ostrander, Inspector of Indian Agencies, Saskatchewan, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, March 21, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 614).

The government finally agreed in 1954 to a second investigation, to be conducted by Commissioner Leo Trelenberg, whose mandate was "to investigate the Indian membership protests, Peepeekisis Band."[557] Goforth's group, unlike the group of members whose membership was protested, was not represented by legal counsel at the hearing. Trelenberg's report outlines that he relied primarily on the evidence of the meetings held to vote on memberships, including evidence of the individuals present, whether they voted, and the results of the vote to admit each individual. Trelenberg also investigated the credibility of witnesses claiming to have knowledge of the details of those meetings. Evidence surrounding the signing of the 1911 Fifty Pupil Agreement was also before Trelenberg, as the correctness of memberships of persons admitted in accordance with the agreement depended on its validity. Although he stated that some, if not all, of the "protested" members "were admitted improperly,"[558] Trelenberg accepted the arguments of the protested members and did not recommend overturning the validity of their memberships.[559]

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[554] James Allison Glen, Minister of Indian Affairs, Ministerial Order, April 3, 1947, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 621).

[555] Copy of Petition, "Peepeekisis Indian Band," February 10, 1948, NA, RG 10, vol. 7969, file 62-111, part 1 (ICC Exhibit 1, p. 630).

[556] M.C. Shumiatcher, Shumiatcher & McLeod, Barristers and Solicitors, to D.M. MacKay, Director, Indian Affairs Branch, April 26,1950, NA, RG 10, vol. 7679, file 62-111, part 1 (ICC Exhibit 1, pp. 631–32).

[557] L.L. Brown, Registrar, to N.J. McLeod, Superintendent, Fort Qu'Appelle Indian Agency, March 10, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 726).

[558] Leo Trelenberg to L.L. Brown, Indian Affairs Branch, Ottawa, June 1, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 730).

[559] Leo Trelenberg to Registrar, Indian Affairs Branch, July 30, 1954, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, pp. 744–47).

Commissioner Trelenberg's findings led to further pressure from Peepeekisis' Chief and council, triggering a review of the report by an Advisory Committee made up of three senior departmental officials, W.C. Bethune, W.M. Cory, and M. McCrimmon. They chose, because of conflicting evidence, to make no recommendations regarding 24 of the 28 protested members. Nevertheless, they were the first high-ranking officials to level serious objections regarding Graham's conduct and disregard for the law in obtaining memberships for the graduates,[560] a matter to which we shall return. The committee set out three possible solutions, as recounted in the Historical Background, finally recommending that the deputy minister choose the option of a negotiated settlement.

Notwithstanding the parties' efforts to arrive at a settlement, the issue of memberships remained unresolved. The registrar, therefore, made a ruling on February 10, 1956, in which he upheld the memberships of all but two protested members. It was the registrar's decision that was appealed by Goforth's group pursuant to the *Indian Act* and which led to the review of Judge J.H. McFadden of the district court of Melville, Saskatchewan. As Judge McFadden's ruling is the basis for Canada's defence that *res judicata* applies to defeat this specific claim, it is reproduced in Appendix F of this report.

Canada raises *res judicata* as a defence, first, to any allegation that the memberships of the graduates in the Peepeekisis Band should now be declared invalid; and, second, as a defence to the First Nation's allegation that, apart from the question of validity, the methods and conduct used by the Crown's agents in obtaining the consents and the 1911 Agreement breached the Crown's fiduciary duty to the Band. After assessing the application, if any, of the defence of *res judicata* to validity of memberships and the methods to obtain them, we shall address Canada's defence that *res judicata* operates to defeat the entire claim.

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[560] W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, Ottawa, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 756). The draft of this report is even harsher in its criticism of Graham: "These [the ex-pupils] were of a progressive type and rapidly took over the Peepeekisis Band affairs. In all some 50 or more non-Peepeekisis Band members were placed under this Scheme. From the time that the first non-member was brought upon the reserve *the original members of the Peepeekisis Band violently opposed this Scheme and claimed their rights were being violated*. Our records show that Mr. Graham forced his will upon the band and the original members were forced into the background by the new-comers and had little or no say in the management of their reserve. The evidence discloses that the individuals were brought by Mr. Graham – (1) without a vote as required by the 1895 Legislation, and as time went on (2) with a vote by a few of the original members and a majority of the newcomers (3) with a vote of newcomers. With regard to (2) the original members claim they were forced to vote by Mr. Graham or bribed to do so. Our records bear out this contention." The references to the three ways in which Graham brought in new members was retained in the final report. Draft of W.C. Bethune, W.M. Cory, and M. McCrimmon, Indian Affairs Branch, Ottawa, memorandum to the Registrar, January 21, 1955, NA, RG 10, vol. 7111, file 675/3-3-0, part 1 (ICC Exhibit 1, p. 760). Emphasis added.

The Law on Res Judicata

It is necessary first to outline the statutory provisions that enabled Ernest Goforth's group to protest the memberships of the graduates. The process under the *Indian Act* to protest an individual's membership can be traced to an amendment to the *Indian Act* in 1887, which gave the Superintendent General the right to make a final decision regarding band memberships, subject only to a right of appeal to the Governor in Council.[561]

This section remained in the 1906 and 1927 *Indian Acts*, but in the 1951 and 1952 Acts the government changed the process for appealing an individual's membership. Section 9 of the 1952 Act, as amended in 1956, provided that any 10 electors of a band could, within a certain time period, launch a protest to the registrar against the inclusion of names on the band list. The registrar would then investigate the matter and render a decision that was final unless the registrar received notice to refer the decision to a judge for review. Sections 9(3)(b) and (4) are particularly relevant to Canada's defence of *res judicata*:

> (3) Within three months from the date of a decision of the Registrar under this section
> ...
> (b) the person by or in respect of whom the protest was made, may, by notice in writing, request the Registrar to refer the decision to a judge *for review*, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge ... .
>
> (4) The judge of the county, district or Superior Court, as the case may be, shall *inquire into the correctness of the Registrar's decision*, and for such purposes may exercise all the powers of a commissioner under Part 1 of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and *the decision of the judge is final and conclusive*.[562]

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[561] *An Act to amend "The Indian Act,"* SC 1887, c. 33, s. 1.

[562] *Indian Act*, RSC 1952, c. 149, s. 9, as amended by SC 1956, c. 40, s. 2. Emphasis added.

These provisions make it clear that the judge's mandate was to conduct a review of the correctness of the registrar's decision. That decision and all the material before the registrar were to be placed before the judge. In addition, the judge also exercised the powers of a commissioner under Part I of the *Inquiries Act,* such as the power to subpoena persons or documents.[563]

It is the common law that has defined the doctrine of *res judicata* or "issue estoppel."[564] The onus is on Canada to establish that the defence of *res judicata* is applicable to this claim. The purpose of the defence, as explained by Canada, is "to prevent abuse of the judicial process"[565] by preventing a party from relitigating the same action or issue in a subsequent suit between the same parties. The Supreme Court of Canada in the 2001 decision of *Danyluk v. Ainsworth Technologies Inc.*, a case involving a previous decision by an employment standards officer regarding an employee's complaint, expanded on the objective of this defence:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.[566]

Canada relies on Sopinka, Lederman, and Bryant in *The Law of Evidence in Canada* for the following proposition, quoting with approval *Henderson v. Henderson*:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation*, and which *the parties, exercising reasonable diligence, might have brought forward at the time.*[567]

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[563] *Inquiries Act*, RS 1952, c. 154, ss. 4, 5.

[564] The defence of *res judicata* has two distinct forms, "issue estoppel" and "cause of action estoppel." In this inquiry, "issue estoppel" is the relevant term. See Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 1. This report uses the terms "issue estoppel" and *res judicata* interchangeably.

[565] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 65.

[566] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 481.

[567] John Sopinka, Sydney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999), 1078–79, quoting *Henderson v. Henderson*, [1843–60] All. ER Rep. 378 at 381–82 (Ch.), reproduced in Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 66. Emphasis added. Canada also relies for this proposition on *Maynard v.Maynard*, [1951] SCR 34 at para. 67.

Although Canada characterizes the doctrine of *res judicata* as a substantive, not a technical, defence,[568] the authors of *The Law of Evidence in Canada* disagree:

> Although it is sometimes referred to as a rule of substantive law, the better view is that it is a rule of evidence. Essentially, the party against whom the suit or issue was decided is estopped from proferring evidence to contradict that result.[569]

Finally, Canada points out that "[w]here the determination of an issue or a finding of fact is necessarily part of the reasoning required to dispose of the claim initiated by the claimant, whether or not it is explicitly addressed, it too is *res judicata*."[570]

In reviewing the law of *res judicata*, the Supreme Court in *Danyluk v. Ainsworth* set out the analysis to be followed in determining its application. After first determining that the decision in the prior proceeding was a judicial decision, the next step, stated the Court, is to determine whether the party relying on the doctrine of *res judicata*, or issue estoppel, has established three preconditions to its operation (as set out by Dickson J in *Angle v. Minister of National Revenue*).[571] They are that the same question has been decided; that the judicial decision which is said to create the estoppel was final; and that the parties to the judicial decision were the same persons as the parties to the current proceedings in which issue estoppel is raised.

Even if all three preconditions are met, stated the Court, it may exercise judicial discretion to refuse to apply issue estoppel in order to achieve fairness in accordance with the circumstances of the case. The Court relied on the Ontario Court of Appeal in *Schweneke v. Ontario* for the correct statement of the law governing judicial discretion in the circumstances of an administrative tribunal's prior decision:

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[568] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 65.

[569] John Sopinka, Sydney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999), 989–90.

[570] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 68, relying on George Spencer Bower, Alexander K. Turner, and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), 87.

[571] *Angle v. Minister of National Revenue*, [1975] 2 SCR 248 at 254, quoted in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 477.

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. ... The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?[572]

Mr Justice Binnie in *Danyluk* determined that, in exercising discretion for or against the application of issue estoppel, the court's "objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."[573] Binnie J listed seven discretionary factors relevant to the *Danyluk* case, referring to a similar list created by Laskin JA in *Minott v. O'Shanter Development Co.* but pointing out that the list remains open. They include the wording of the statute from which the power to issue the order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the procedure; the expertise of the decision-maker; the circumstances giving rise to the prior proceeding; and the potential injustice.[574] Binnie J described the final factor, potential injustice, as the most important. In making its decision, he stated, the court should take into account the cumulative effect of all the foregoing factors and consider whether issue estoppel would cause an injustice.[575] In *Danyluk*, the Court exercised its discretion to refuse to apply issue estoppel, even though the three conditions had been met.

The final common law rule relevant to this inquiry concerns "decisions *in rem*." A decision *in rem* results from a proceeding to determine the status of a person or thing. As stated by D.J. Lange in *The Doctrine of Res Judicata in Canada*,[576] "a decision *in rem* is conclusive against all persons, not only against the parties to the proceeding. It removes the estoppel requirement of a litigant in a subsequent proceeding to prove that the litigant was a party to ... the earlier proceeding."[577] In other words, a decision *in rem* eliminates the third precondition – that of the need to have the same parties in both proceedings.

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[572] *Schweneke v. Ontario* (2000), 47 OR (3d) 97 at 108 (Ont. CA), referred to in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 493.

[573] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 494.

[574] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 494–98, referring to *Minott v.* O'Shanter *Development Co.* (1999), 42 OR (3d) 321 at 339–40.

[575] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at 499.

[576] Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 375.

Lange also cites *Law v. Hansen*[578] for the proposition that a decision *in rem* is conclusive of the ground on which the prior decision-maker decided or may be presumed to have decided. He sums up decisions *in rem* as a doctrine of estoppel that prevents the relitigation of the status or condition of a thing or person and the relitigation of the grounds for the judgment.[579]

Of particular importance to this inquiry is a further statement by Lange:

> As with issue estoppel, for the doctrine of judgments *in rem* to apply in a subsequent civil proceeding, it is necessary that the factual finding of the first court be essential to the judgment and ascertainable from the judgment itself. The essential facts are universally binding. *A judgment in rem in civil proceedings binds third parties as to the points directly decided but not as to any matter which is collaterally in question or which is to be inferred by argument.*[580]

On the question of whether the subsequent proceeding can deal with issues, facts, or allegations that were raised in the previous proceeding, Canada relies on Spencer Bower, Turner, and Handley, *The Doctrine of Res Judicata*:

> It was decided as long ago as 1747 that where a question was necessarily decided in an earlier suit, although not in express terms, the same question could not be raised again between the parties in a later suit. ... *However, the inferred judicial determination must be reasonably clear.*[581]

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[577] Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 375.

[578] *Law v. Hansen* (1895), 25 SCR 69 at 73.

[579] Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 375–76.

[580] Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 376. Emphasis added.

[581] George Spencer Bower, Alexander K. Turner, and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), 87. Emphasis added.

In summary, the common law is clear that there are three preconditions to the operation of issue estoppel. If the prior judicial decision is a decision *in rem*, however, the third precondition – that the parties in the second proceeding be the same parties – need not be met. The essential facts in an *in rem* decision, together with the decision, are binding, but, according to Lange, the parties in a subsequent proceeding are not prevented from raising matters in the first proceeding that were collateral or to be inferred by argument. If conclusions of law or findings of fact can legitimately and clearly be inferred from the decision, however, Spencer Bower advises that *res judicata* extends to those conclusions or facts. Finally, if the party raising issue estoppel is successful in meeting the preconditions, the court must still determine whether, as a matter of discretion, it will allow the defence, as the rules governing issue estoppel are not to be mechanically applied.

Validity of the Graduates' Memberships in the Peepeekisis Band

It should be made clear at the outset that the First Nation is not asking the Commission to make a finding that the formal transfers of memberships of the graduates are invalid. On the contrary, the First Nation brings this claim on behalf of all its current members and is content that this inquiry proceed on the basis that the Consents to Transfer are valid today, notwithstanding the allegations of serious irregularities in the Crown's methods of obtaining them. Canada, however, is asking the Commission to make a finding that the decision of Judge McFadden in 1956 was final and cannot be reopened by the Commission should it wish to do so.

When the Peepeekisis First Nation claim was rejected in December 2001, Canada gave as one of its reasons that Judge McFadden "looked at these issues and determined that the consents were proper."[582] In its 2003 written arguments, Canada consolidated its position regarding the evidence at the McFadden hearing, indicating for the first time that it would rely on the defence of *res judicata*. If successful, the defence would not only prevent the Commission from reviewing the question of validity of memberships but, according to Canada, provide a complete defence to all aspects of this claim.

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[582] Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada, to Chief Walter McNabb, Peepeekisis First Nation, December [24], 2001(ICC Exhibit 4B, p. 3).

The validity of the memberships of the graduates is no longer an issue in this inquiry. Nevertheless, we shall assess whether the doctrine of *res judicata* applies to validity for the purpose of determining whether the Commission can scrutinize the conduct and methods of the Crown in obtaining those consents.

Judge McFadden explained his mandate at the beginning of his December 13, 1956, decision as follows:

> This is a Reference by the Registrar under the Indian Act for a review of his decisions by which, after investigation, he found that the first twenty-three [out of twenty-five] parties above named were entitled to be registered as Indians in the Peepeekisis Band ... This review covers all twenty-five cases. I shall deal to some extent with each case in the order named and later shall deal, more or less generally, with all the cases to which somewhat similar facts or points of law might apply.[583]

The panel accepts that Judge McFadden was carrying out his mandate as a judge of the district court of Saskatchewan, not as a commissioner, and that his judgment, therefore, was a "judicial decision." It is also obvious that the present inquiry does not involve the same parties as were before Judge McFadden. The parties before him were a group of protestors within the Band and 25 individuals whose memberships in the Band were being protested. The Crown was not a party, although it supplied documents and Registrar McCrimmon to assist in the review. In the specific claims inquiry, the Band itself is a party, as is the Crown. However, it is a recognized principle that if the decision can be characterized as a decision *in rem*, the third precondition (same parties) need not be met. The panel finds that the McFadden decision is a decision *in rem*, in that it was a pronouncement on the status of individuals and their right to be included on the membership list of the Peepeekisis First Nation.

Looking now at another precondition, what was the question to be decided by Judge McFadden, and is it the same question that is now before this Commission? Judge McFadden spent the majority of the ruling making decisions on the entitlement to membership of each of the 18 individuals who did not transfer under the 1911 Agreement. He examined evidence of paylists, completed Consent to Transfer forms, and approvals by the Superintendent General. Nowhere in the decision did Judge McFadden refer specifically to the position of the protestors with respect to the evidence on individual memberships. As for the protested memberships of the five individuals who came in under the 1911 Agreement, Judge McFadden reasoned that, although he was concerned about the lack of evidence from the department surrounding the agreement and had reservations about his jurisdiction to make a finding on its validity, he declared it valid, although rather gingerly: "If I have jurisdiction in that regard, I am not prepared to say that I consider the agreement to be valid beyond question but I have arrived at the conclusion that it is valid rather than invalid."[584]

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[583] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, p. 3), appended hereto at Appendix F.

Having found the agreement to be valid, the only reference that Judge McFadden made to the protestors or to their arguments was to remark that Ernest Goforth was not an illiterate man and was, in fact, well-educated at the time that he signed the agreement and accepted the $20 payment. In summary, Judge McFadden concluded that the first 23 of the 25 memberships in question (the other two belonged in a separate category) met the provisions of the *Indian Act*, in particular section 11 that set out the categories of persons eligible to be registered in the Indian Register.

We are prepared to find that the question of membership validity before Judge McFadden in 1956 is the same question that could be asked of this Commission as part of the larger specific claim. The only other precondition to be met in the case of a decision *in rem*, therefore, is the precondition that requires that the decision in 1956 be a final one. Section 9 of the 1952 *Indian Act*, as amended, answers that question in the affirmative by stating that a decision of a judge acting pursuant to this provision is "final and conclusive."

We conclude that, on the narrow question of validity of memberships, Canada has met the two preconditions relevant to a decision *in rem* – the question is the same and the previous decision was a final one. Moreover, the question of membership validity is not one on which we should exercise our discretion to refuse to apply the doctrine of issue estoppel on the basis that it would cause an injustice. The test is to ask, "Is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?"[585] We are mindful that the First Nation argues that the graduates who transferred into the farming Colony also suffered injustices at the hands of Graham. As Judge McFadden and others before him have concluded, it would have been no solution then to uproot the graduates after many years and to force them to relocate. Nor would a declaration of invalidity of some memberships provide any solution to the Peepeekisis Band today, if one group within the Band were displaced in order to rectify an injustice to the descendants of the *original* members. The defence of *res judicata* therefore succeeds on the issue of validity of memberships.

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[584] McFadden Decision, December 13, 1956 (ICC Exhibit 6C, p. 18), appended hereto at Appendix F.

[585] *Schweneke v. Ontario* (2000), 47 OR (3d) 97 at 108 (Ont. CA).

The Crown's Conduct in Obtaining the Consents to Transfer and the 1911 Agreement

Counsel for the First Nation takes the position that the validity of memberships is only one part of the panel's considerations "on the whole question of the Crown's fiduciary obligation."[586] Canada's position, however, is that the law of *res judicata* prevents the Commission from reviewing not only the earlier decision on validity but any of the evidence before Judge McFadden relating to the Crown's conduct in obtaining those consents or procuring the 1911 Agreement.[587]

Can the Crown's Conduct in Procuring Memberships Be Reviewed?

First, we must determine whether the Commission is prevented by the doctrine of *res judicata* from examining the methods used by William Graham and others to obtain the Consents to Transfer and the 1911 Agreement, as part of our inquiry into the Crown's lawful obligation to the Band. For that purpose, we intend to rely on the facts as contained in the transcript and the decision in the McFadden hearing, the law of *res judicata* cited above, and the application of the law to those facts.

Our reading of the transcript of the McFadden hearing[588] reveals these relevant considerations. The hearing involved the review of membership decisions for two bands – Peepeekisis and Okanese; this fact alone is significant because it underscores that the purpose of the hearing was to review the entitlement to memberships in any band where there were protests, not only Peepeekisis. The issue before Judge McFadden was clearly set out – to determine the correctness of the registrar's decisions on the entitlement of certain individuals to be registered as members of the band. The registrar of the department, Malcolm McCrimmon, appeared as a witness.

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[586] ICC Transcript, April 3, 2003, p. 224 (Thomas Waller, QC).

[587] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 72.

[588] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B).

After Judge McFadden discussed his mandate at the commencement of the hearing with M.L. Tallant, the lawyer for the 25 protested members, the judge and Tallant together expressed the judge's mandate as "a combination of all the old evidence and any new evidence which the parties may wish to bring forward today."[589]

The evidence before Judge McFadden included Treaty 4, the relevant *Indian Acts*, the Band List, Consents to Transfer, approvals by the Superintendent General, the Trelenberg transcripts, and other information, as well as hearing from a few witnesses. The judge, McCrimmon, and Tallant focused almost exclusively on reviewing the proof surrounding each individual's membership as evidenced by the documents. Judge McFadden relied heavily on Tallant to bring forward all the pertinent evidence on membership, even though Tallant warned him that he was there to represent the protested members and should not be expected to present both sides of the case.[590]

In stark contrast was Ernest Goforth, who came to the hearing without legal counsel because the protestors could not afford to pay their lawyer. Judge McFadden expressed serious concern that Goforth was unrepresented in this type of matter but was advised by the Crown in writing that it would not employ legal counsel for either side because membership protests were "disputes between Indians."[591] Judge McFadden attempted at times to help Goforth, but at other times was dismissive of him, at one point admonishing him for not considering the plight of the people whose memberships he was protesting: "What about these men that came in good faith, settled on that Reserve, built homes, raised families, grandfathers and grandmothers, all these families – are they not entitled to some consideration?"[592]

It is apparent from the outset that Goforth did not understand the process. He started by claiming that he was not a criminal; he also stated that he did not know the *Indian Act* and was illiterate compared to judges and lawyers.[593] As the hearing progressed, Goforth admitted that he could not speak to certain documents because he had never seen them and did not know that he had the right to see them.[594] When asked if he wanted time to go through Graham's files, containing all the consents for admission to the Band, Goforth declined, commenting that "I don't feel how much I went over that, the conditions of admitting Indians varies so much, I don't know what good it would do me to go over those anyway.[595] Goforth, understandably, was also completely unable to rebut Tallant's arguments with respect to substance, procedure, and the admissibility of certain evidence. Goforth did not even attempt to question witnesses and was advised not to give evidence himself about matters, such as the leadership of the Band, that were not within his personal knowledge.[596]

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[589] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 16).

[590] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 12, 26, 58–59).

[591] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 16).

[592] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 43–44).

[593] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 18–19).

Although Goforth was a reasonably intelligent and educated person, it is obvious from reading the transcript that he was completely out of his depth at the hearing. When he realized that there would be an adjournment of several days to obtain the original membership list, he advised the judge that he did not have enough money to stay the required length of time.[597] When asked for a summary of the protestors' position, Goforth gave arguments regarding Treaty 4 and the fact that the *Indian Act* should not be contrary to the Queen's promises of land. As such, said Goforth, Graham should have got the consent of the majority of the *original* band members or descendants before bringing people into the Colony.[598]

Judge McFadden appeared to have no interest in Goforth's position, however, and did not comment on the substance of Goforth's remarks. Tallant, in fact, summed up the extremes in his and Goforth's understanding of the purpose of the hearing when he stated that he was happy that the protestors had set out

> their grievances under the Treaties and so forth – and under the provisions of the Indian Act. No matter how the decision goes the matter is on record and will be in the Department's file where it will have to be read. If the Department does not want to

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[594] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 37, 39, 47, 68).

[595] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 53).

[596] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 73).

[597] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 30).

[598] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 34–38).

> read it somebody will dig it out and it will have to be read. So at least he has achieved that. *Whether or not this method of procedure was correct or not is a different matter.*[599]

This statement has proven to be prescient but, more important, it is an indication that what Judge McFadden, Tallant, and McCrimmon were concerned with, rightly in our estimation, was the correctness of the procedure under the Act to transfer memberships. The little evidence before McFadden that could have raised questions of irregularities in the meetings to approve new members was largely ignored. Goforth's objective of explaining Graham's alleged infringement of the rights of the original Band – be it treaty, statutory, or otherwise – played no part in the ruling. Moreover, the Crown's fiduciary obligations to aboriginal peoples had not even been recognized by the courts in 1956.

The First Nation argues strenuously that the McFadden hearing does not preclude this inquiry from considering the evidence of the Crown's conduct in this matter. According to the First Nation, the hearing was only "a review of the decision of the Registrar on membership issues. McFadden was presented with material from the Trellenberg [sic] Inquiry and heard evidence from a few witnesses. The standard of review, as outlined in the legislation itself, was one of correctness."[600] By carefully controlling the evidence that went before Judge McFadden and by denying funding for legal counsel to represent Goforth's group, says the First Nation, the department "ensured that [its] internal doubts were not provided to the Judge and did not provide evidence in key areas relating, in particular, to the 1911 Agreement."[601] The First Nation also states that as McFadden's decision was confined solely to the issue of membership and the evidence provided to him, it "cannot, in any way, be construed as determining whether Canada's conduct, through Graham and other departmental officials, may have constituted a breach of lawful obligation owed to the Peepeekisis First Nation."[602]

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[599] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, p. 242). Emphasis added.

[600] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 109.

[601] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 110.

[602] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 111.

Canada's argument, in contrast, rests on its assessment that "all the allegations and evidence on invalid or improper consent (lack of meetings, lack of votes, undue influence, inducement, bribery, unconscionable circumstances) and on pauperization of the *original* members were raised before Judge McFadden. These are the same allegations raised in this claim, and they have already been ruled upon by a court of competent jurisdiction."[603]

The panel finds that the doctrine of *res judicata* has no application to the evidence before us regarding the Crown's conduct and methods in procuring the Consents to Transfer and the 1911 Agreement. From our review of the transcript and ruling in the McFadden hearing, it appeared that Judge McFadden had little before him regarding Graham's conduct surrounding membership transfers, information that was known to the department but not disclosed by McCrimmon. Further, Goforth was unable to address properly issues of conduct within this judicial process, confining his statements to broad conclusions about the Crown's obligations. Had Goforth's group been represented by legal counsel, the record in the McFadden hearing might have been more revealing, but, given the judge's narrow mandate, even that evidence may well have been ruled inadmissible. Instead, Judge McFadden had what Tallant chose to lay before him and little else. The transcript reveals plainly that the hearing greatly favoured the protested members.

We find that the evidence of Graham's conduct in orchestrating the membership transfers and the 1911 Agreement were, at best, collateral to the main question before Judge McFadden. According to Lange, *res judicata* is not binding with respect to "any matter which is collaterally in question or which is to be inferred by argument."[604] Nowhere in the ruling is there any suggestion that Judge McFadden, in assessing each individual membership, considered Graham's pattern of conduct as potentially nullifying the validity of the Consents and the agreement. It was clearly not a question that was, using the words of Spencer Bower in *The Doctrine of Res Judicata*, "necessarily decided ... although not in express terms." Even if the evidence of conduct had been fully canvassed at the hearing, any inferred judicial determination, according to Spencer Bower, would have had to be

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[603] Written Submission on Behalf of the Government of Canada, December 23, 2002, para 75.

[604] Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000), 376.

"reasonably clear."[605] In our view, no reasonable person reading the transcript or the ruling could come to such a conclusion.

We are therefore prepared to review the methods used by Graham in obtaining memberships for the graduates to determine if Graham's conduct breached the Crown's lawful obligation to the Peepeekisis First Nation. We confine our examination to the Crown's fiduciary obligation.

Was Graham's Conduct in Procuring Memberships a Breach of Fiduciary Obligation?

First, it is apparent that Graham was able to use the fact that the Peepeekisis Band was particularly vulnerable during this critical time. The Consent to Transfer forms and the 1911 Agreement were found to be valid by Judge McFadden, and the 25 protested individuals were thereby entitled to be entered as members of the Band. Yet the panel remains concerned that the Band was without recognized band leadership for about 40 years. Between 1894, when the last of Chief Peepeekisis and his headmen had passed away, until 1935, the department did not formally recognize any leaders at Peepeekisis,[606] including Peepeekisis' son Shave Tail, who was considered to be "the hereditary chief."[607] At least one *original* band member, Ernest Goforth, believed that Graham would not allow a Chief and council, and that he effectively assumed the role of chief himself.[608]

Second, compounding the lack of leadership, the panel finds troubling the evidence that indicates either a lack of meetings to approve the transfer of band memberships or irregularities in the meetings that were held. In the words of the Acting Deputy Minister in 1956: "As a settlement scheme, it was reasonably successful, but I am afraid that the provisions of the Act with respect to the transfer of Indians from one Band to another may have been given scant consideration."[609]

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[605] George Spencer Bower, Alexander K. Turner, and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), 87. Reproduced in part in Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 68.

[606] Violet Kayseass, Registration, Revenues and Band Governance, DIAND, to Donna Gordon, Head of Research, ICC, August 14, 2002 (ICC Exhibit 12, pp. 6–7); Transcript of Proceedings, July 2, 1954 (ICC Exhibit 6A, p. 305, Fred Dieter).

[607] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 23, Alice Sangwais (née Shave Tail); pp. 195–96, Elwood Pinay; pp. 246–47, 264, Don Koochicum).

[608] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 43 (ICC Exhibit 6A, p. 47, Ernest Goforth). See also Shave Tail to J.D. McLean, Department of Indian Affairs, July 2, 1912, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, pp. 549–50); ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 195, Elwood Pinay; pp. 264–65, Don Koochicum).

As noted above, during the Trelenberg Inquiry, farming instructor Albert Miles confirmed that, although it was his signature as a witness to the Consent forms, he was never asked by anybody from the agency to call a meeting of the Band to admit further members. Nor was he aware of any meetings ever having taken place during the entire period of his employment from 1901 to 1912, except for the 1911 Fifty Pupil Agreement.[610] Yet Fred Dieter said during the same inquiry that the general practice for notifying band members of meetings was by the farm instructor going around to let people know.[611] Other colonists gave similar evidence, but Henry McLeod specified that the farm instructor was given the job to go around among the farmers.[612]

Further on this point, the 1905 Consent to Transfer forms for John Bellegarde, George Keewatin, Francis Dumont, and Mark Ward, attesting to a favourable vote by the majority, led to conflicting evidence regarding the existence of the meeting called for that purpose. One of the voters, Roy Keewatin, himself a transferred band member, testified at the 1954 Trelenberg Inquiry that he had never attended or been notified of any meeting with regard to the admission of other members.[613] But during the 1956 McFadden hearing, Mr Keewatin clarified that he had been referring to meetings of the *original* band members and that he had attended a number of meetings (apparently not attended by *original* members) for the admittance of new members.[614]

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[609] Acting Deputy Minister, Department of Citizenship and Immigration, to the Minister of Citizenship and Immigration, January 11, 1956, RG 10, vol. 7111, file 675/3-3-0, part 2 (ICC Exhibit 1, p. 788).

[610] Trelenberg Inquiry, Transcript of Proceedings, July 2, 1954, pp. 271–72 (ICC Exhibit 6A, pp. 281–82, Albert Miles).

[611] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 166–68 (ICC Exhibit 6A, pp. 174–76, Fred Dieter).

[612] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, pp. 166–68 (ICC Exhibit 6A, pp. 174–76, Fred Dieter; pp. 187–88, Joseph Ironquil; p. 198, Clifford Pinay; pp. 213–14, Francis Dumont; p. 245, Henry McLeod).

[613] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 220 (ICC Exhibit 6A, p. 228, Roy Keewatin).

[614] McFadden Hearing, Transcript of Proceedings, October 9–15, 1956 (ICC Exhibit 6B, pp. 131–40, Roy Keewatin).

Third, as time passed, the population was increasingly made up of industrial school graduates who had previously transferred into the Band. In 1903, the voting majority was still made up of the *original* band members when the transfers of 11 graduates were approved. The signatories to the Consents were three Peepeekisis band members: Tommy Fisher, who had transferred into the Band in 1891 from Gordon's Band, prior to the Scheme, after his marriage to a band member; Buffalo Bow, who had transferred into the Band in 1887 from Okanese, prior to the Scheme; and Yellow Bird, whose name first appeared in the 1883 paylist. All are considered to be *original* members. In 1905, however, the Consents to Transfer for John Bellegarde, George Keewatin, Francis Dumont, Mark Ward, and Herbert Oliver Mentuck were approved by a majority of members who were themselves, with the exception of Joseph Desnomie, earlier transferees under the colony Scheme – Fred Dieter, J.R. Thomas, Joseph McKay, Ben Stonechild, Roy Keewatin, Joseph Desnomes, and Peter Swan.

The panel observes that, by1906, the transferees constituted a bare majority of the male members of the Band and that, over the next few years, that majority grew. As such, it became increasingly easier for Graham to find members to vote to admit subsequent graduates. In 1908 and 1909, the consents for 10 new members were approved only by transferred members, although there is evidence that some *original* members were present at the 1908 vote.[615] That Graham both orchestrated and took full advantage of this situation was consistent with his objective of regularizing and "legalizing" the previous acts of bringing non-members to the reserve and allocating lots to them without band consent.

The irregularities in the meetings themselves, detailed in the Historical Background, are too numerous to recount. The discrepancies range from the number of graduates settled on the reserve in a given year to Consent forms dated when the person in question was absent from the reserve. There is evidence from the Trelenberg Inquiry that Magloire Bellegarde told Ernest Goforth that Graham singled out Philippe Johnson for not raising his hand during a membership vote, whereupon Johnson immediately raised his hand.[616] Suffice it to say that Graham kept incomplete and questionable records regarding the formalities of calling meetings and conducting votes to admit graduates into the Band.

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[615] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 236 (ICC Exhibit 6A, p. 244, Henry McLeod).

[616] Trelenberg Inquiry, Transcript of Proceedings, May 25–28, 1954, p. 51 (ICC Exhibit 6A, p. 55, Ernest Goforth).

Fourth, the panel finds the evidence that some of the industrial school graduates were brought to the File Hills Colony against their will to be indicative of the lengths to which Graham was prepared to go to obtain members for the Band who would succeed as part of the Scheme. They were young, placed on a reserve that was not their home, and became totally dependent on Graham. In his oral testimony, Don Koochicum explained: "[A] lot of these people here that were put here were forced onto this reserve against their will, and they were afraid also."[617] They were sent to the Colony and, in some cases, their marriages were arranged for them. Daniel Nokusis recounted what Clifford Pinay told Nokusis' father: "I [Clifford] was only 15 or 16 years old. I was finished school. I thought I was going to go back to Sakimay he says, but he [Graham] sent me – even before I stepped out he told me I got a woman for you to go and start farming in Peepeekisis."[618] Clifford Pinay also told this story to his grandson Wes Pinay: "He [Clifford] told him I'd like to go back to my reserve. He [Graham] says no, you're not, you're coming up here."[619]

This is not to say that all the industrial school graduates brought into the File Hills Scheme arrived against their will. Some of them appear to have expressed great interest in coming to the Colony. As has been noted, Fred Dieter openly spoke of his desire to become a member of the File Hills Scheme and to prove to Graham that he was a "sticker." In 1905, Frank Natawaywinis, a student at the Regina Industrial School who was supposed to return to his home at the Swan Lake reserve to take up farming, asked for permission to settle instead at the Peepeekisis Colony.

Finally, the panel notes that the authorities did little to correct Graham's actions of bringing non-band members to the reserve for the purpose of settling them there as band members. A letter from an official with the department, Martin Benson, to Frank Pedley about Natawaywinis indicates a level of awareness of Graham's methods:

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[617] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 261, Don Koochicum).

[618] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 303, Daniel Nokusis).

[619] ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 218, Wes Pinay). See also ICC Transcript, September 11–12, 2002 (ICC Exhibit 5A, p. 225, Wes Pinay).

> It was apparently intended that this colony should embrace only Indians belonging to the File Hills Agency, but as Dr. Mackay says that Mr. Inspector Graham is quite willing to receive other good boys if the Commissioner will give his consent ....
>
> I think that when ex-pupils, even if belonging to other reserves, are anxious and willing to settle in the colony, [we need] to offer them every facility to do so, even should it be necessary to enlarge the colony to take in such pupils.[620]

It is clear that the Indian Commissioner and the department's Secretary were aware of the manner in which Graham was allowing industrial school graduates to establish themselves on the Peepeekisis reserve before their admissions as band members. For example, when the Consent to Transfer forms for Bellegarde, Keewatin, Dumont, and Ward were sent to the department in 1905, Commissioner Laird reported to Secretary McLean that they had been "farming in the Colony for some time; but transfers for their final admission to the Colony were not asked for until Mr. Inspector Graham was satisfied that they would prove themselves to be good workers."[621]

With respect to Graham's methods of securing approval for the 1911 Fifty Pupil Agreement, we note that there was growing opposition to the influx of graduates both from the *original* members and from those in the Colony. Graham's plan, therefore, was to offer each band member $20 to vote in return for giving the department the right to choose up to 50 more students, the exclusive right to transfer them into the Band, and the right to settle the students on any amount of land, anywhere on the reserve. The panel is particularly concerned about the evidence suggesting that Graham placed money on the table before the vote at the second meeting called to approve the agreement, after the voters had already turned it down. This event took place at a time when some members had no money to attend the annual Regina exhibition, an important event in their lives.

In addition, regardless of the sometimes conflicting evidence about the notice, number, and locale of the meetings to obtain approval of the agreement, the number of days between the meetings, or even the possibility that the agreement was brought to the homes of some voters to sign, the panel is convinced that Graham did not follow an open, transparent, and fair process in obtaining the approval for the 1911 Agreement.

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[620] Martin Benson, Department of Indian Affairs, to the DSGIA, May 1, 1905, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 418).

[621] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, July 21, 1905, NA, RG 10, vol. 7111, file 675/3-3-10, vol. 1 (ICC Exhibit 1, p. 435).

Had Graham so much as provided detailed accounts of the notices for each of the meetings, a clear record of the dates, times, and places of the meetings, the attendance, and other pertinent details, it would have been more difficult to ignore his version of the events surrounding the 1911 Agreement and the individual Consents to Transfer. The evidence, however, reveals a defiantly reckless approach to record-keeping. The First Nation points to many deficiencies in the records of the membership transfers: a number of Consents with date changes; Consents that list Tommy Fisher as Chief and Buffalo Bow and Yellow Bird as councillors when both Graham and the department knew that the Band had no recognized leadership; the absence of minutes of meetings to approve Consents to Transfer; and, in the case of some Consents, the possibility of no meetings at all.[622]

One of the most blatant examples of Graham's faulty record-keeping is the fact that, according to his written assertion, he had "received a petition signed by the majority of the voting members of the Band."[623] requesting a second vote on the proposed 1911 Agreement. Yet, no petition has ever been located. Given Graham's lack of attention to records, the panel is not prepared to infer that the petition never existed. Its absence, however, is damaging to Graham's credibility. That petition was Graham's only justification for presenting the proposed agreement for a second vote within days of the first, failed vote. He should have made very sure that this essential document was preserved.

As to the 1911 Agreement, it is true that inconsistencies exist in some of the evidence heard in the 1950s, including the testimony of Goforth and Ironquil; nevertheless, the panel is persuaded that their accounts, together with the recollections of the elders in this inquiry, illustrate that Graham exercised such extreme influence over the people, both *original* members and the graduates, that he could eventually orchestrate a successful vote by using money, fear, and a shoddy process that went beyond mere clerical errors.

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[622] Written Submission on Behalf of the Peepeekisis First Nation, October 21, 2002, para. 55; and ICC Transcript, April 3, 2003, pp. 23–26 (Thomas Waller, QC).

[623] W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to the Secretary, Department of Indian Affairs, August 23, 1911, NA, RG 10, vol. 7768, file 27111-2 (ICC Exhibit 1, p. 532).

Canada argues that the Consents to Transfer forms are *prima facie* proof of the facts set out in the document: that a meeting was called for the purpose of approving a transfer, and that a majority of the Band voted in favour of the transfer. According to Canada, in the face of conflicting evidence from the Band, some of which was hearsay, the version of events contained in the Consents prevails, proving compliance with the *Indian Act*.

Even if Canada is correct that the evidence surrounding Graham's conduct in obtaining membership transfers falls short of establishing a breach of the *Indian Act*, we conclude that Graham and the department breached the Crown's fiduciary obligation to the Band. Graham's success in procuring the Consents to Transfer and the 1911 Agreement was simply the final and most important piece of the puzzle that began with the decision to commence the farming Scheme at Peepeekisis.

We have already found that the Scheme itself and two of the elements of implementation – bringing non-members to Peepeekisis and allocating subdivided lots to them before their transfers – were also in breach of the Crown's fiduciary obligations. The methods and conduct that we have detailed on transfers of membership – taking advantage of the vulnerability of the Band; forcing some graduates to move to Peepeekisis; relying on the growing power of the graduates to vote in more graduates; and obtaining the Consents to Transfer and the 1911 Agreement through irregular means – are totally consistent with Graham's conduct in every other aspect of the Scheme. No one action by Graham tainted the process; however, the cumulative effect of a number of highly questionable practices corrupted virtually every part of the Crown's implementation strategy. And the results for the Band were dramatic; as more and more graduates were brought to the reserve, the Band gradually lost its identity as the Band that had entered treaty.

In summary, the panel has concluded that it is prevented by the doctrine of *res judicata* from making findings on the validity of the Consents to Transfer. For the same reason, we are prevented from making findings on the validity of the 1911 Agreement, as Judge McFadden ruled in 1956 that the agreement was "more valid than invalid." Nevertheless, we have concluded that the Commission is not prevented in this inquiry from reviewing the evidence of Graham's methods and conduct, as condoned by department, in procuring approval for the Consents and the 1911 Agreement. On this front, the Crown breached its fiduciary obligation to the Band.

THE DEFENCE OF *RES JUDICATA* TO THE ENTIRE SCHEME

Canada has attempted to defeat this specific claim by using a defence that has a very narrow application in law. After reviewing this claim for 16 years and rejecting it without raising the defence of *res judicata*, Canada now takes the position that, when members of the Peepeekisis Band consented to admit graduates to the Band and voted in favour of the 1911 Agreement, they were thereby consenting to all aspects of the Scheme. By extension, Canada appears to be saying that the Consents to Transfer and the 1911 Agreement had the retroactive effect of correcting in law any illegal actions committed by the department. In any event, says Canada, the defence of *res judicata* now prevents this Commission from examining any of these issues for breach of lawful obligation. The panel finds it very disconcerting that Canada, having acknowledged at the oral hearing that the creation of the Scheme and its constituent elements are issues in this inquiry, would nevertheless attempt to confine the scope of the inquiry to the question of membership.

We have already agreed with Canada that *res judicata* applies to the validity of the memberships procured through Consents and the 1911 Agreement. Canada, however, takes the position that Judge McFadden, in his decision, necessarily had to consider breach of treaty, breaches of the *Indian Act* (other than the provisions on memberships), and, presumably, fiduciary obligation in making his decision. These issues, states Canada, are the very issues before the Commission. Our review of the ruling and the transcript of the McFadden hearing, however, totally negates this position, in particular Canada's statement that,

> [i]n ruling that the protested members were entitled to remain as members of the Peepeekisis Band, Judge McFadden determined that the "colonization scheme" was lawful. The farming project entailed a sharing of the lands and assets of the Peepeekisis Band with the transferred members. Therefore, the membership protests and the "colonization scheme" are inextricably linked. A finding that the transfers were done in accordance with the law is a finding that the "colonization scheme" was also lawful.[624]

At the oral hearing, counsel for Canada attempted to explain more clearly Canada's position. When asked how Judge McFadden dealt with issues of treaty, the *Indian Act*, and fiduciary breach, Canada's counsel conceded that the cause of action before the Commission differs from that before

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[624] Written Submission on Behalf of the Government of Canada, December 23, 2002, para. 80.

McFadden, in that there was no suggestion "that Judge McFadden considered whether or not there was a breach of treaty."[625] When questioned further on the authority of the Crown to conduct the entire operation of the Scheme, counsel conceded that the legal authority for the farming Scheme itself was an issue before this Commission, as were treaty issues, statutory compliance, and the fiduciary obligation;[626] nevertheless, stated counsel, "the issue of consent is fundamental, and if you accept that – if you accept Judge McFadden's conclusions on that issue, it addresses – addresses these claims."[627]

The "issue of consent" before McFadden, however, was consent of the Band to the admission of individuals to the Band, as evidenced by the Consent to Transfer forms or as granted by the 1911 Agreement. It was not consent to other matters such as the appropriation of Peepeekisis reserve land for a farming Scheme. As more graduates arrived and more land was subdivided for the farmers, the Scheme itself quickly became a *fait accompli*. But under no circumstances could it be inferred from the Consents to Transfer that the Band was giving consent to the prior disposition of its reserve land.

At the risk of repetition, we point out that the issue before Judge McFadden was entitlement to be included in the Indian Registry, in accordance with sections of the *Indian Act*. Judge McFadden's mandate was narrowly confined by section 9(4) of the *Indian Act* to an inquiry into the correctness of the registrar's decision whether the person in question was entitled, in accordance with sections 11 and 12 of the *Indian Act*, to be included in the Indian Registry. In contrast, the issues before this Commission – breach of treaty, statute, and fiduciary obligation – were not even collateral issues before Judge McFadden. Even if they had been, according to Lange, *res judicata* would not apply to any collateral matter or matter to be inferred by argument. Even Spencer Bower would not apply the doctrine unless the inferred judicial determination were reasonably clear.

The First Nation points out that two cases have interpreted the sections of the *Indian Act* that governed Judge McFadden's hearing. The case of *Re Indian Act; Re Poitras*[628] confirms that in a judge's ruling under section 9(4) of the Act, the section defining those persons who are not entitled to be registered has no retroactive application. In that regard, we note that neither the Consent forms nor the text of the 1911 Agreement contain any terms regarding retroactivity. The *Poitras* case and a 1954 ruling, *In Re Wilson*,[629] also confirm that reviews under section 9(4), such as the review by Judge McFadden, are concerned primarily with the interpretation of sections 11 and 12 of the Act on entitlement to be registered, not other matters.

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[625] ICC Transcript, April 3, 2003, p. 123 (Uzma Ihsanullah).

[626] ICC Transcript, April 3, 2003, pp. 124–30, p. 129 (Uzma Ihsanullah).

[627] ICC Transcript, April 3, 2003, p. 124. See also p. 130 (Uzma Ihsanullah).

[628] *Re Indian Act; Re Poitras* (1956), 20 WWR 545 at 561 (Sask. Dist. Ct).

In contrast to the mandate of Judge McFadden, the Indian Claims Commission's mandate is to conduct an inquiry into a specific claim that has been rejected by the federal government, in order to report on whether the First Nation has a valid claim under the Specific Claims Policy. The government will accept the claim for negotiation if it is persuaded by the Commission report that the Crown owes a lawful obligation to that First Nation. The reach of the Commission's mandate goes far beyond the issue of membership validity that was before Judge McFadden in 1956. The Commission, by comparison, investigates alleged breaches of the Crown's legal obligations arising from sources that may include a treaty, the *Indian Act*, and the fiduciary relationship.

Moreover, as a body that is required to meet the objectives of the federal government's 1982 policy, *Outstanding Business*, the Commission is cognizant of the government's stated commitment to "liberalize past practice," to adopt "a more liberal approach eliminating some of the existing barriers to negotiations," to "enter into negotiations in a spirit of good faith," and to resolve claims "in a fair and equitable manner."[630] The panel considers that Canada's reliance on *res judicata* as a blanket defence to the entire colony Scheme is the antithesis of its policy to introduce fairness and equity into the process of resolving claims.

Except with respect to the validity of memberships, the defence of *res judicata* must fail. Canada has not succeeded in persuading the panel that the questions before this Commission are the same questions that were before Judge McFadden in 1956. His decision was in no way determinative of the First Nation's claim today that the Crown breached its obligations in undertaking and implementing the File Hills Scheme.

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[629] *In Re Wilson* (1954), 12 WWR 676 (Alta Dist. Ct).

[630] *Outstanding Business*, 16, 21, and 33, reprinted (1994) 1 ICCP 179–80.

In light of these findings, it is unnecessary to ask the question whether applying *res judicata* would cause an injustice to the Peepeekisis First Nation; however, given a number of factors, including the objectives of the Specific Claims Policy, the stated purpose of membership reviews under the *Indian Act*, Judge McFadden's own doubts about his jurisdiction, and the lack of legal representation for the protestors, the application of the doctrine of *res judicata* in the circumstances of this claim would be a gross injustice to the First Nation.

COMPENSATION CRITERIA

By agreement of the parties, the Commission was asked to make recommendations with respect to the criteria to be used to determine compensation to the Peepeekisis First Nation, should this claim be accepted by the Government of Canada for negotiation. Although the parties have put forward some arguments on applicable compensation criteria, the panel is of the view that this issue requires more extensive argument. The panel therefore makes no findings or recommendations regarding the interpretation or applicability of particular compensation criteria under the Specific Claims Policy. Having said this, our report is clear that the panel has found that the Peepeekisis Band has indeed suffered losses and damages, quite distinct from any losses or damages which any individual band members may have suffered. In the panel's view, these losses and damages suffered by the Band are clearly compensable under the Specific Claims Policy.

It will be for the parties in their negotiations to determine which of the specific criteria under the Claims Policy should apply. If the parties are unable to reach agreement on applicable compensation criteria, the panel invites them to return to the Commission for assistance in resolving the impasse.

BEYOND LAWFUL OBLIGATIONS

As the panel has found that the Crown breached its lawful obligations to the Peepeekisis First Nation in the creation and implementation of the File Hills Scheme on the Peepeekisis reserve, it is unnecessary to consider whether the Crown's actions resulted in a claim under the heading "Beyond Lawful Obligations," as outlined in the Native Claims Policy.

PART V

CONCLUSIONS AND RECOMMENDATION

The File Hills Scheme was composed of a totality of elements, including the initial decision by the Crown to start a farming Colony on the Peepeekisis reserve, followed by the placement on the reserve of graduates who were non-band members, the subdivision of reserve land for the Colony, the allocation of subdivided lots to the graduates, the provision of special assistance to the graduates, and the procurement of membership in the Peepeekisis Band for the graduates. It was, by all accounts, a unique experiment in Canadian history.

By its very decision to place the Scheme on an established reserve without the knowledge and consent of the Band, the Crown breached Treaty 4, the *Indian Act*, and its fiduciary obligation to the Peepeekisis Band. The first breach of lawful obligation to the Band took place in 1898. By gradually placing non-band members on the reserve, the Crown was in breach of the *Indian Act*. In addition, the Crown's allocation of lots to the graduates was a breach of Treaty 4, the *Indian Act*, and the fiduciary obligation to the Band. Finally, in the procurement of memberships, the Crown also committed breaches of its fiduciary obligation to the Band. Only two of the five elements of implementation – the subdivisions and the special assistance to the graduates – were within the Crown's lawful authority.

The gradual diversion of approximately 18,720 acres of the best reserve land from the collective use and occupation by the original Band, through artificially increasing band membership, was no less than a travesty of justice.

Canada's defence of *res judicata* succeeds only insofar as it prevents the Commission from questioning the validity of the individual membership transfers and the 1911 Fifty Pupil Agreement. The Commission rejects the application of this defence to matters that were either not put to Judge McFadden or were at best collateral matters, in particular the conduct and methods of Graham in procuring the graduates' memberships. Moreover, the Commission cannot accept Canada's attempt to subject all issues in this claim to the narrow defence of *res judicata*. We can think of no conceivable way in which *res judicata* applies to the issues of treaty interpretation, statutory compliance with respect to the placement of the graduates on reserve and the allocation of land to them, and fiduciary obligation, all of which are before this Commission.

The Crown could have avoided a serious breach of its lawful obligations simply by developing the farming Colony on Crown land outside a reserve and by following its own statutory procedures. Instead, it decided to save its resources by using the reserve of an unsuspecting band that was without leadership during the whole period. Through the ambition of one Indian Agent, William Graham, and with the approval of the Department of Indian Affairs, the Crown embarked on a series of illegal practices which seriously infringed on the Peepeekisis Band's legal interest in its reserve and forever changed its identity as a band.

We therefore recommend to the parties:

> **That the Peepeekisis First Nation's File Hills Colony claim be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Renee Dupuis
Sheila Purdy

Alan C. Holman
Commissioner

Renée Dupuis
Chief Commissioner

Sheila G. Purdy
Commissioner

Dated this 29th day of March, 2004.

APPENDIX A

INTERIM RULING: PEEPEEKISIS FIRST NATION INQUIRY, FILE HILLS CLAIM, SEPTEMBER 14, 2001

September 14 , 2001

Mr. Thomas J. Waller
Olive, Walter, Zinkhan & Waller
2255 - 13th Avenue
Regina, Saskatchewan S4P 0V6

- And -

Ms. Uzma Ihsanullah
DIAND Legal Services
Specific Claims Branch
Les Terrasses de la Chaudiere
10 Wellington Street
Hull, Quebec K1A 0H4

Dear Mr. Waller and Ms. Ihsanullah:

Re: Peepeekisis Cree Nation [File Hills Colony] Claim
Our file: 2107-38-01

Further to the First Nation's August 9, 2001 request (which followed the 1st Planning Conference of July 24, 2001) that the Commission make a formal decision to conduct an inquiry into its claim, we have had an opportunity to consider this matter and have decided to proceed with the inquiry. The reasons for our decision are as follows.

INTRODUCTION

This preliminary ruling is in relation to a specific claim filed in April 1986 by the Peepeekisis First Nation (Peepeekisis), in which it is alleged that Canada breached its lawful obligation to the First Nation as a result of the creation and implementation of what is referred to as the File Hills Colonization Scheme at the turn of the last century.

Since Peepeekisis filed its claim in 1986, Canada has not responded as to whether the claim will be accepted for negotiation or will be rejected as disclosing no outstanding lawful obligation. In 1997, Peepeekisis requested the Indian Claims Commission facilitate

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Canada's response to their claim. After an initial meeting of the parties in October 1997, Canada estimated that it could complete its legal opinion in six months time (April 1998) and would make delivery of its preliminary position a priority following receipt of the legal opinion.

On August 25, 1999, Cindy Calvert, Senior Analyst (SCB) advised Chief McNabb that due to the complexity of the facts of this claim, the legal review has taken much longer to complete. Despite this delay, Ms. Calvert promised delivery of Canada's preliminary position within six to eight weeks. This commitment was not honoured. On March 20, 2001, the First Nation requested the Commission conduct an inquiry into its claim.

The Commission convened its 1st Planning Conference of the parties on July 24, 2001 in Regina, Saskatchewan. At this meeting, the First Nation requested the Commission make a formal decision to conduct an inquiry into their claim. This request was then followed by a written submission provided by Mr. Waller to Ms. Lickers under cover of August 9, 2001, wherein the First Nation submitted that 15 years is sufficient time for Canada to determine whether a claim should be validated or not. On the basis of its previous rulings in other cases, the First Nation requested that after 15 years, the Commission consider this claim to have been rejected and proceed with its inquiry.

Prior to the 1st Planning Conference Ms. Ihsanullah advised that Canada would be attending but in the role of observer, since in its view the claim had not been rejected. At the planning conference Ms. Ihsanullah confirmed Canada's position as "observer" and indicated that she would not, at this time, challenge the Commission's mandate to proceed, choosing instead to devote its resources to completing its review of this claim. Ms. Ihsanullah did not object however, to the Commission making a formal ruling on whether or not to conduct an inquiry. Upon receipt of Mr. Waller's written submission delivered August 9, 2001, Canada did not deliver a comprehensive responding submission but did respond by letter of August 17, 2001 from Ms. Ihsanullah to Ms. Lickers.

In coming to our decision, the panel has relied upon the August 9, 2001 submission of the First Nation and Canada's correspondence.

FACTS

The Peepeekisis First Nation originally submitted a claim to the Minister of Indian Affairs in April 1986 seeking compensation for Canada's actions in respect of the colonization and subdivision of the Peepeekisis Reserve at the turn of the century.

The Peepeekisis First Nation takes the position that "after more than fifteen years, Canada has had more than ample time to be able to formulate and communicate its position on the claim to the First Nation."[1] As a consequence, the First Nation requests that the Commission interpret Canada's inability to provide its position as constituting, in practical terms, a rejection of the claim.

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[1] Submissions on Jurisdiction, Filed on Behalf of the Peepeekisis First Nation, Indian Claims Commission File No. 2107-38-01-PC, August 9, 2001, page 2, paragraph 8.

By its own admission, Canada has not yet provided the First Nation with its response to the claim. Prior to the first planning conference, Ms. Ihsanullah by letter of July 17, 2001 wrote Ms. Lickers to explain Canada's position, she states,

> "This is to confirm that Canada will be attending the Planning Conference in the role of observer, since it is our view that the claim that is the subject matter of this inquiry has not been rejected. Indeed, my client is still in the process of reviewing the claim and no final decision has been made."

Canada did not deliver a responding brief to the First Nation's submission that the Commission proceed with its inquiry on the basis that the passage of time is tantamount to a rejection. Canada did however, communicate its response by letter of August 17, 2001 from Ms. Ihsanullah to Ms. Lickers, stating,

> "...Canada does not object to the Indian Claims Commission (ICC) conducting an inquiry in this matter. We have, however, indicated that we will not be actively participating in this inquiry [Ms. Ihsanullah to Ms. Lickers, July 17, 2001]. To date, we have attended only as observers and with a view to assist in whatever manner is available to us given our limited role. Our position results from an attempt to balance our view that the ICC does not have a mandate to inquire into claims which have not been formally rejected, with the practical reality that we anticipate a response to be forthcoming from the Minister in the next few months. Once a response has been received our role will evolve in one manner or another. Given the length of time that the Peepeekisis First Nation has waited for a response, we do not wish to delay this process any further with a legal challenge to the ICC's mandate. However, we do reserve the right to make such a challenge in the unlikely event that the situation does not unfold as we expect and it becomes necessary."

The correspondence from Ms. Ihsanullah to Ms. Lickers of July 17, 2001 and August 17, 2001 represents the written position of Canada in this matter. As stated above, Canada takes the position that until the Minister has formally responded to this claim, to either accept this claim for negotiation or to reject it, Canada will not actively participate in the Commission's inquiry and will only participate as an "observer".

CHRONOLOGY OF CLAIM

1986

18 Apr 1986 Claim submitted to the Honourable David Crombie, Minister of Indian Affairs.

1992

29 Apr 1992 Statement of Claim filed with the Federal Court of Canada.

1997

08 Sep 1997 Pamela Keating, SCB, to T.J. Waller stating because of the Dept. of Justice increased work load she can not say when the legal review of the claim will be completed.

25 Sep 1997 Chief Eugene Poitras to John Sinclair, Assistant Deputy Minister ". . . The First nation is adamant that if there is no response by October 31 next, we will consider the claim to have been rejected, and will request that the Indian Claims Commission immediately commence a public inquiry. . ."

06 Oct 1997 Anne Marie Robinson, Director, SCB to Chief Eugene Poitras "Your claim has been given priority status with the Department of Justice ... I anticipate that Canada will be able to provide you with its preliminary opinion in approximately 6 months as this is the average time it takes to conduct a legal review."

1998

18 Feb 1998 Cindy Calvert, Senior Analyst, SCB to Tom J. Waller, Solicitor, following a December 1997 meeting with the First Nation representatives: "... An estimated time for the completion of the legal opinion is six months after the evidence has been submitted to Justice. Since there is still documentation to be submitted, in effect that period has not even started yet. However, in this case we requested that DOJ continue to work on the opinion while the First Nation and SCB compile and analyze additional evidence. ... The research and analysis supporting this claim were done years ago, and may be inadequate by today's standards and in relation to current law. We would therefore support any efforts the First Nation wishes to make to update and strengthen their claim. ... Specific Claims Branch is trying to resolve this claim in a timely matter [sic]."

16 Mar 1998 Carole Vary, DOJ, informed ICC that Canada's legal opinion has been delayed because further research is required.

08 Jun 1998 Cindy Calvert informed ICC that additional research was completed by Canada and provided to First Nation for review.

08 Dec 1998 Tom Waller to Cindy Calvert indicating "that a number of target dates for completion of the Justice opinion for Canada...has come and gone."

1999

09 Feb 1999	Cindy Calvert to Chief McNabb, "This claim was filed with the Specific Claims Branch (SCB) at the Department of Indian and Northern Affairs Canada (DIAND) in April 1986. As such, it is one of the oldest claims in our system, and we are looking forward to its resolution in the very near future...the claim was referred to the Department of Justice for a legal opinion in January 1990. Upon review of the claim, DOJ requested additional information. At that point, the progress of the claim appears to have been tied up in funding requests by the First Nation, changing officers in Specific Claims and at DOJ, and complexities caused by the potential that the claim has to cause a disruption among members of the Peepeekisis First Nation....Carole Vary is nearing the completion of her legal opinion. We expect to give you Canada's preliminary position on this claim within the next two months."
21 Jul 1999	Carole Vary informed ICC that she anticipates completing legal opinion "within a few weeks"; then to be reviewed by Claims Advisory Committee.
25 Aug 1999	Cindy Calvert to Chief Walter McNabb that, "due to the complexity of the facts" DOJ estimates it will take one to two months to finalize opinion.

2000

12 Jan 2000	Sharon Rajack, DOJ, advises ICC that legal opinion is complete and has gone to peer review.
08 Feb 2000	Cindy Calvert to Chief Walter McNabb that "I have received the legal opinion from Department of Justice"; claim being prepared for Claims Advisory Committee and SCB will then send letter advising of Canada's preliminary position in about 6 to 8 weeks time.

2001

07 Feb 2001	Sharon Rajack, DOJ, to Tom Waller, "the opinion on your client's specific claim is currently being concluded."
26 Feb 2001	Tom Waller to Sharon Rajack advising that the First Nation awaiting decision based on the evidence SCB currently has.
20 Mar 2001	Sharon Rajack, DOJ, informed ICC that Canada's response, promised by end of March 2001, has been delayed.
12 Apr 2001	BCR received from the First Nation requesting Inquiry and giving authority to obtain documents from Canada.

THE JURISDICTION OF THE ICC

The mandate of the Commission is contained in Order in Council PC 1992-1730, which states, in part, that the Commissioners shall:

> inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.

The Commission has considered its jurisdiction to accept a claim in previous inquiries. In his submission, counsel for the First Nation referred to the earlier decisions of the Commission in the *Lax Kw'alaams Indian Band Report* and the *Mikisew Cree First Nation*:

> In *Lax Kw'alaams Indian Band Report*, the Commission concluded:
>
> "...that the Commission's mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy. In our view, this Commission was created to assist the parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission's mandate is not strictly limited to the four corners of the Specific Claims Policy." [2]
>
> In the *Mikisew Cree First Nation* the Commission concluded:
>
> "...that Canada has had sufficient time to determine whether an outstanding 'lawful obligation' is owed to the [First Nation]. Under the circumstances, he [Commissioner Bellegarde] considered the lengthy delays being tantamount to a rejection of the claim for the purposes of determining whether [the Commissioners] have authority to proceed with an inquiry under their terms of reference."[3]

Much like the case of Peepeekisis, the preliminary ruling in the *Mikisew Cree Nation Inquiry* dealt with the First Nation's allegation of unreasonable delay. In *Mikisew*, Canada challenged the mandate of the Commission to accept a claim for review before Canada had expressly rejected it. Canada argued that there must be a rejection of the claim on its merits before the Commission can proceed with an inquiry.

We would also include our statements from the Commission's preliminary ruling on mandate in the *Alexis First Nation Inquiry* where we said,

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[2] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* [1995] 3 ICCP p. 99 at 158.

[3] ICC, *Mikisew Cree First Nation Inquiry* [1998] 6 ICCP p. 183 at 209.

> "We agree with the *Athabasca Denesuline*[4] ruling that the Order in Council establishing the Commission's mandate does not set out how a claim is "rejected". Further, we agree with the argument expressed by counsel for Mikisew Cree that a "rejection" should not be confined to an express communication, either written or verbal, but can be the result of certain action, inaction or other conduct. To restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently."[5]

Furthermore, we confirm our interpretation of our mandate to be remedial in nature in this case. In this case, perhaps more clearly than any other to date, we echo our ruling in the *Alexis First Nation* that "it is incumbent on all participants in the specific claims process to ensure that Canada's final resolution is arrived at without subjecting the First Nation to a myriad of delays...It could not have been the intent of Parliament when it designed the mandate of the Commission to prevent a First Nation from utilizing the ICC in circumstances where Canada has not made a decision on acceptance or rejection within a reasonable time. The ability to intervene in these circumstances is wholly consistent with the remedial nature of the Commission's mandate."[6]

By the First Nation's own statement, "the burden of Canada's failure to deal with this claim rests very much with the Peepeekisis First Nation. A number of elders who would have been available to give evidence before a Commission of Inquiry and other key members of the First Nation have passed on. For example, Les Goforth, the Headperson assigned responsibility for the claim for many years, died suddenly in April of this year [2001]."[7]

In our view, the nature of the harm caused to the First Nation by Canada's delay in addressing this claim, namely by the loss of Elders and other people with a depth of knowledge and developed expertise regarding the claim, imputes the kind of prejudice which today prevents the First Nation from presenting its best case had the claim been responded to in a timely manner. Furthermore, while the panel is aware that a determination of whether the Commission has the jurisdiction to proceed with an inquiry will depend upon the circumstances of each case, the panel is aware of at least one instance where, in the circumstances of the *Long Plain First Nation Loss of Use* claim, Canada agreed that if it failed to respond to the First Nation's claim submission within an agreed upon timeframe, the claim would be deemed rejected so as to prevent prejudice to the First Nation.[8]

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[4] ICC, *Interim Ruling: Athabasca Denesuline Treaty Harvesting Rights Inquiry, Ruling on Government of Canada Objections*, [1994] 1 ICCP 159.

[5] ICC, *Interim Ruling: Alexis First Nation - Transalta Utilities Right of Way Inquiry* (April 27, 2000).

[6] ICC, *Interim Ruling: Alexis First Nation - Transalta Utilities Right of Way Inquiry* (unpublished, April 27, 2000) page 8.

[7] Submissions on Jurisdiction, Filed on Behalf of the Peepeekisis First Nation, Indian Claims Commission File No. 2107-38-01-PC, August 9, 2001, p. 2, paragraph 9.

In this case the panel concludes that after 15 years, Canada has had more than sufficient time to determine whether it breached a lawful obligation to Peepeekisis by undertaking and implementing a colonization scheme. In particular, the panel finds that the time taken to complete the historical research and legal analysis, cannot be justified after so many years. Compounding this delay is the Department's repeated failure to honour its commitment to deliver a preliminary position no less than four times since 1999.

CONCLUSION

The panel confirms the Commission's findings in previous rulings that it has the mandate to make decisions regarding its jurisdiction to review claims.

Further, we conclude that in the circumstances of this case, the effect of the numerous delays on the part of Canada and the breach of its numerous commitments, is tantamount to a rejection of the claim. The Commission therefore retains its jurisdiction to review the claim.

By letter of April 12, 2001 from Ms. Lickers, the parties were requested to submit all relevant documents to the Commission. To date Canada has not provided its documentary disclosure as requested. The panel therefore directs the parties to deliver all relevant documents to the Commission by September 30, 2001.

The panel fully anticipates the complete cooperation of the parties with the Commission's efforts to bring this inquiry to its next stages and will exercise all of its powers to ensure that this inquiry proceeds to its conclusion in a timely manner.

FOR THE INDIAN CLAIMS COMM

Sheila Purdy Commissioner	Alan Holman Commissioner	Renee Dupuis Commissioner

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[8] ICC, *Long Plain First Nation: Report on Loss of Use* [2000] 12 ICCP 269 at 281.

APPENDIX B

INTERIM RULING: PEEPEEKISIS FIRST NATION INQUIRY, FILE HILLS CLAIM, NOVEMBER 28, 2001*

INDIAN CLAIMS COMMISSION

INTERIM RULING: PEEPEEKISIS FIRST NATION INQUIRY FILE HILLS CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commissioner Sheila G. Purdy
Commissioner Renée Dupuis
Commissioner Alan Holman

COUNSEL

For the Peepeekisis First Nation
Tom Waller

For the Government of Canada
Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers

NOVEMBER 2001

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* Reported (2003) 16 ICCP 111.

BACKGROUND

The Indian Claims Commission has considered Canada's request that it reconsider its September 14, 2001, decision to accept jurisdiction to proceed with its inquiry into the Peepeekisis First Nation's specific claim regarding the File Hills Colonization Scheme. The basis for Canada's request was first articulated at the second planning conference of October 10, 2001, and then set out in greater detail by letter of October 16, 2001. After careful examination of the matter, the Commission has decided that it will not reconsider its decision of September 14, 2001. The reasons for this decision follow.

By its letter of October 16, 2001, Canada submits that it did not have the opportunity to make submissions on the matter of the Commission's authority to proceed with its inquiry in the absence of a formal rejection by the Minister of Indian Affairs. The chronology of events and Canada's own statements during the Commission's initial proceeding by way of planning conferences, however, suggest otherwise.

First, during the initial planning conference of July 24, 2001, the parties discussed the question of the Commission's mandate to proceed in the absence of a letter of rejection from the Minister. According to the planning conference summary provided to the parties, Canada decided that it would not formally raise a mandate challenge at the time but that it would not actively participate in the inquiry until the Minister's position was delivered. The summary also noted that the parties agreed to submit written submissions regarding the Commission's jurisdiction to proceed, in the absence of a formal rejection, by August 10, 2001. Both the First Nation and Canada accepted that the Commission's counsel would submit the matter to the Commission for a decision. The First Nation's position was sent to the Commission on August 9, 2001; Canada responded to these submissions by letter on August 17, 2001. Canada did not address the arguments raised by the First Nation but instead set out the position that it "does not object to the ICC conducting an inquiry in this matter" and would attend as observers only.

Second, notwithstanding its decision to observe the process, Canada did participate in the discussions at the two planning conferences of July 24 and October 10, 2001, respectively. In particular, it discussed the matters at issue before this Commission and had the opportunity on at least both these occasions to indicate formally its position regarding the Commission's mandate. At no time, however, did Canada identify the Commission's mandate to proceed as an issue in dispute (as evidenced by the statement of issues established during the second planning conference). The panel is content that Canada participated at least to some extent in the process, and at the very least, did not object to the process.

Third, after the summaries of the two planning conferences were sent to the parties, Canada did not express disagreement with the content of those summaries respecting Canada's position on the mandate challenge. Nor did Canada object to providing its statement of position on the question of the Commission's mandate by August 10, 2001.

Although Canada reserved its right to proceed with a mandate challenge, it did not. In fact, in its August 17, 2001, letter, Canada stated its position explicitly: "To clarify, Canada does not object to the ICC conducting an inquiry in this matter." The panel reads this sentence to be unequivocal.

Fourth, Canada has not presented any new arguments or facts in support of its request that we reconsider our decision of September 14, 2001. Its October 16 letter merely stated that "Canada did not participate" in the ICC's September 14 decision to proceed with the inquiry, nor did it have "an opportunity to present its arguments regarding this issue." We find those statements surprising and unconvincing, given the documentary record to date.

Finally, at no time prior to delivering its August 17, 2001, letter, did Canada request additional time to provide supplementary arguments in support of its position. Furthermore, Canada did not, at any time during the discussions of the parties, raise new objections to the holding of the inquiry, notwithstanding many opportunities to do so.

RULING

In our view, Canada has had the opportunity to be heard. Moreover, upon being formally invited, it agreed to disclose its position on the mandate question, which it did by letter of August 17, 2001. Canada, as well as the

First Nation, is free to choose the manner in which it presents its position and the arguments in support of that position. The written arguments of Canada and the First Nation were provided to the panel, and we gave them serious consideration prior to making a decision.

In closing, the duty of fairness does not require that the Commission provide an oral hearing of the issue. To the extent that the parties are given an opportunity to present their arguments in writing, the duty of fairness has been met. We believe the duty was met in this case.

FOR THE INDIAN CLAIMS COMMISSION

Sheila G. Purdy
Commissioner

Renée Dupuis
Commissioner

Alan Holman
Commissioner

Dated this 28th day of November, 2001.

APPENDIX C

INTERIM RULING: PEEPEEKISIS FIRST NATION INQUIRY, FILE HILLS CLAIM, MARCH 13, 2003

INDIAN CLAIMS COMMISSION

INTERIM RULING: PEEPEEKISIS FIRST NATION [FILE HILLS COLONY]
CANADA'S ADDITIONAL SUBMISSION OF PUBLIC HISTORY INC. REPORT
MARCH 13, 2003

BACKGROUND

1. By agreement of the parties and in preparation for the final Oral Session in this inquiry, the First Nation delivered its written submissions to the Commission on October 21, 2002. Subsequent to this, Canada raised objection to paragraphs 44 and 100 of the First Nation's submission stating "[W]e have grave concerns regarding the First Nation's allegations of non disclosure by Canada."

2. Ms. Ihsanullah delivered Canada's objections by letter of November 12, 2002. Given the seriousness of the matter, we believe it is appropriate to quote Canada's objection precisely,

> "In its submissions, Peepeekisis raises allegations regarding an alleged letter of offer dated sometime in 1962, which it speculates contained an admission of wrongdoing on Canada's part. This allegation was not raised prior to the Community Evidence Session during which two community members claimed to have seen such a letter. In paragraph 44, the First Nation suggests that officials, at the time or thereafter, ensured that the letter was not found. Furthermore, in paragraph 100, the First Nation suggests that a number of other documents pertaining to events in the 1950's which should have been disclosed, have not been disclosed by Canada."

3. As a consequence of Canada's "surprise and dismay that at this stage of the proceeding the First Nation has concerns regarding the diligence and thoroughness of Canada's disclosure in this process," Canada took the position that "it is necessary to review the relevant files again to ensure that any documents relevant to the events of the 1950's and the alleged letter of offer of 1962 have already been disclosed."

4. On November 12, 2002, Ms. Ihsanullah proposed the Commission convene a conference call to discuss Canada's proposal to conduct a second review of the files and indicated that should this second review disclose further documents, Canada would be requesting that these documents be added to the documentary record and Canada would require additional time to prepare its responding written submissions.

5. At this point Canada's responding submissions were, by agreement of the parties, to be delivered by December 3, 2002.

6. On November 15, 2002, Mr. Waller responded by letter to Ms. Ihsanullah's objection. The First Nation took the position that "the substance of paragraphs 44 and 100 merely represent an invitation to the Commission to draw certain conclusions from the absence of documentation...[T]he paragraphs are presented as part of our client's argument on the claim to be considered by the Commission. That argument is based upon the exhibit list that has been agreed to."

7. In response to Ms. Ihsanullah's proposal to conduct a secondary file review, the First Nation took the position that "[I]f Canada needs some additional time to complete its argument, the writer has no difficulty in extending the time to mid-December."

8. Further, "Canada should, however, do whatever it feels necessary within the time which has been allotted to complete and file its argument. If this research leads Canada to modify its rejection of the claim, we can deal with that event as it occurs. It should not however, be used as an excuse to delay consideration of the matter by the Commission."

9. On November 19, 2002, Commission Counsel convened a conference call of the First Nation and Canada to discuss the exchange of correspondence between the parties on November 12 and 15, 2002. Ms. Ihsanullah and Mr. Waller repeated their respective positions regarding paragraphs 44 and 100 of the First Nations written submission. In addition, Ms. Ihsanullah indicated that Canada would require 12 days to complete its secondary file review and requested an extension to January 30, 2003 to deliver Canada's responding submission.

10. Subsequent to the conference call, Ms. Ihsanullah confirmed by letter of November 20, 2002 Canada's request for an extension until the end of January 2003 to file its written submissions.

11. On November 21, 2002, Commission Counsel delivered the decision of the panel. Based upon the First Nation's willingness to accommodate a postponement of the delivery of Canada's responding submission to mid-December and Canada's representation that a documentary review could be complete in 12 days, the Commission panel agreed to extend delivery of Canada's responding submission from December 3 to December 19, 2002.

12. Further, the Commission panel invited Canada to address paragraphs 44 and 100 of the First Nation's submission in its responding submission.

13. Canada in fact delivered its responding submission on December 23, 2002 after requesting a further extension from December 19, 2002 in order to address any legal issues raised by the Supreme Court of Canada's decision in Wewaykum Indian Band v. Canada rendered December 6, 2002.

14. The First Nation was consequently granted until January 13, 2003 to deliver its reply to Canada's responding submissions.

CANADA'S INTERIM REPORT PREPARED BY PUBLIC HISTORY INC.

15. Without prior notice to the Commission, on January 23, 2003, Canada submitted an interim report prepared by Public History Inc. for inclusion in the evidentiary record in this inquiry. Ms. Ihsanullah explained that this interim report was prepared in response to the Peepeekisis First Nation's allegations contained in paragraphs 44 and 100 of its submissions. Further, a final report would be delivered in two weeks time.

16. As previously agreed by the parties and directed by the Commission, the panel was scheduled to hear the final legal argument of counsel on February 6, 2003 at the Oral Session.

17. In light of Canada's request to submit additional documents into the record at this stage in the inquiry, the Commission panel directed counsel to appear on February 6, 2003 for the purpose of considering Canada's request to add to the evidentiary record. In anticipation of legal argument of counsel, the Commission panel requested by letter of January 31, 2003 that counsel for Canada be prepared to respond to a series of questions.

CANADA'S FINAL REPORT PREPARED BY PUBLIC HISTORY INC.

18. On February 5, 2003, the Commission received the final report prepared by Public History Inc., one day before the interim hearing into the matter.

19. As explained in its "Methodology & Summary of Findings", the primary purpose of the research report "was to determine whether the Federal Government records contain a 1962 letter of offer from DIAND to the Peepeekisis First Nation in reference to the File Hills Colony Claim & membership protests circa 1954-1955."

20. "The secondary purpose was to ensure that the Department of Justice possesses the key documents for the 1954-1955 negotiations between the Peepeekisis Band and the Department of Indian Affairs and to determine whether there is evidence of negotiations after 1955."

21. The research project involved a review of Federal Government records for the period from 1954 through 1964 from RG 10 (Department of Indian Affairs) of the National Archives of Canada, DIAND's Main Record Office, the regional office in Regina and the Federal Records Centre in Edmonton.

22. The Public History Inc. Final Report explains that, "[A]ll told, we identified 17 files in Regina and 54 files in Edmonton, of which 25 were still DIAND files and 29 of which had been transferred to the custody of the National Archives. In conducting our research, we

were able to review 60 of the 73 files we had identified. The remainder had either been destroyed in accordance with the law, or could not be found (2 files)."

23. In its summary of findings, the Public History Inc. Final Report sets out that the research revealed the following:

> "1. SCB is in possession of all key records dealing with the 1954-55 negotiations that are to be found in the available files.
>
> 2. A letter of offer (circa 1962) to the Peepeekisis First Nation does not exist within the files reviewed. Two documents from the relevant time period do reference an offer, and those documents have been copied and provided to SCB.
>
> 3. While there appears to be further communication between the two parties during the post-1956 period, there is no evidence contained within the records reviewed that DIAND and the Peepeekisis "original members" entered into further negotiations after the 1954-55 negotiations.
>
> 4. We did, however, find documents referring to the 1954-1955 negotiations, which have been indexed and copies provided to SCB (both attached)."

DOCUMENTS CANADA SEEKS TO INTRODUCE INTO THE EVIDENTIARY RECORD

25. As a result of the research carried out by Public History Inc., Canada seeks to introduce twelve (12) pieces of correspondence covering the period 1957 - 1979.

26. On February 6, 2003, the Commission panel convened to hear the arguments of counsel as to why and whether the Indian Claims Commission should allow these documents into the evidentiary record at this stage of the inquiry.

REASONS FOR ALLOWING THE ADDITIONAL DOCUMENTS INTO THE RECORD

27. In the matter of Canada's request in the Peepeekisis First Nation inquiry, the panel rendered a decision on February 6, 2003, and informed counsel for the two parties of its decision in a letter dated the same day. After having heard the arguments of counsel for the two parties, the panel cites the following reasons in support of its decision:

> i) The commission of inquiry's mandate requires that the ICC try to obtain all relevant evidence relating to the subject matter of an inquiry.

ii) The ICC has total discretion, as acknowledged by counsel for the parties during the hearing into the request, to admit into evidence those documents which it deems relevant, as long as it complies with the duty of fairness.

iii) The flexible nature of the ICC's claims process allows the ICC to accept documents into evidence even at this stage of the inquiry into the claim by the Peepeekisis First Nation.

iv) The panel considers that the documents submitted by Canada and to which this request applies, specifically the documents attached to the research report prepared by Public History Inc., are relevant to the present inquiry.

v) The panel considers that these documents contain information that sheds additional light on the matter at issue, particularly those outlined in paragraphs 2 and 3 of the background.

vi) The panel is not aware of any prejudice to the First Nation that would outweigh the probative value of including those documents.

vii) During the hearing into the request held on February 5, 2003, the panel was made aware of a misunderstanding on Canada's part, to the effect that:

a) Canada did not advise the ICC of the fact that the 12-day extension granted on November 21, 2002, at Canada's request, was insufficient time to allow the government to obtain the results of additional research it had commissioned prior to the expiry of the 12-day extension, which led the ICC and the First Nation to assume that the research in question had been completed by the time the government submitted its written arguments on December 23, 2002.

b) Furthermore, Canada did not advise the ICC of this state of affairs when it requested a further extension of the deadline from December 19 to December 23, 2002, which prevented the ICC from considering a longer extension to enable Canada to submit its written arguments after it had learned the results of the additional research.

c) On December 23, 2002, Canada submitted its written arguments without advising the ICC of the fact that its research was still under way at that time, and that it could not therefore state its exact position on the subject in its arguments.

d) As a result, the First Nation's reply was drafted with no knowledge of this state of affairs or of the conclusions of the additional research.

viii) The panel feels that it cannot, in these circumstances, ignore the existence of the documents to which this request applies and which have since been submitted to the panel.

ix) At the hearing, Canada's counsel acknowledged that she should have advised the ICC of the delay and failed to do so. With regard to any prejudice or additional costs related to this issue that the First Nation may have incurred, the panel takes note that "Canada would certainly indicate the reasons for the necessity of further written submission if that is required for the purposes of research funding division" (Ex.15, p. 49, Submission by Ms. Ihsanullah). The panel considers that it is Canada's responsibility to fund all additional costs incurred by the First Nation as a result of Canada's supplementary research.

For all the above reasons, the panel has decided to allow Canada's request to have admitted as evidence in the ICC inquiry into the claim of the Peepeekisis First Nation the final report of Public History Inc., in its entirety, as it was submitted at the hearing into this request held on February 5, 2003.

As the panel indicated in its letter of February 10, 2003 advising counsel for the parties of its decision, Canada must submit any written arguments relating to these documents by no later than **February 25, 2003**, and the First Nation must reply in writing no later than **March 12, 2003**. At that time, should Canada wish to reply it must do so in writing no later than **March 20, 2003**.

Lastly, the panel shall hear counsel for the parties at the final oral session scheduled for **April 3, 2003, in Regina, Saskatchewan.**

FOR THE INDIAN CLAIMS COMMISSION

Commissioner Dupuis Commissioner Purdy Commissioner Holman

March 13, 2003

APPENDIX D

PEEPEEKISIS FIRST NATION INQUIRY
FILE HILLS COLONY CLAIM

1 Planning conferences
July 24, 2001
October 10, 2001
April 4, 2002

2 Community session — Peepeekisis First Nation, September 11-12, 2002

The Commission heard evidence from Chief Walter McNab; head person Claude Desnomie; and elders Alice Sangwais, Mable George, Gilbert McLeod, Florence Desnomie, Jessie Dieter, Elizabeth McKay, Elizabeth Pinay, Wesley Pinay, and Elwood Pinay, Donald Koochicum, Stewart Koochicum, Aubrey Goforth, Glen Goforth, Archie Nokusis, and Daniel Nokusis.

3 Interim hearing — Regina, Saskatchewan, February 6, 2003

4 Legal argument — Regina, Saskatchewan, April 3, 2003

5 Content of formal record

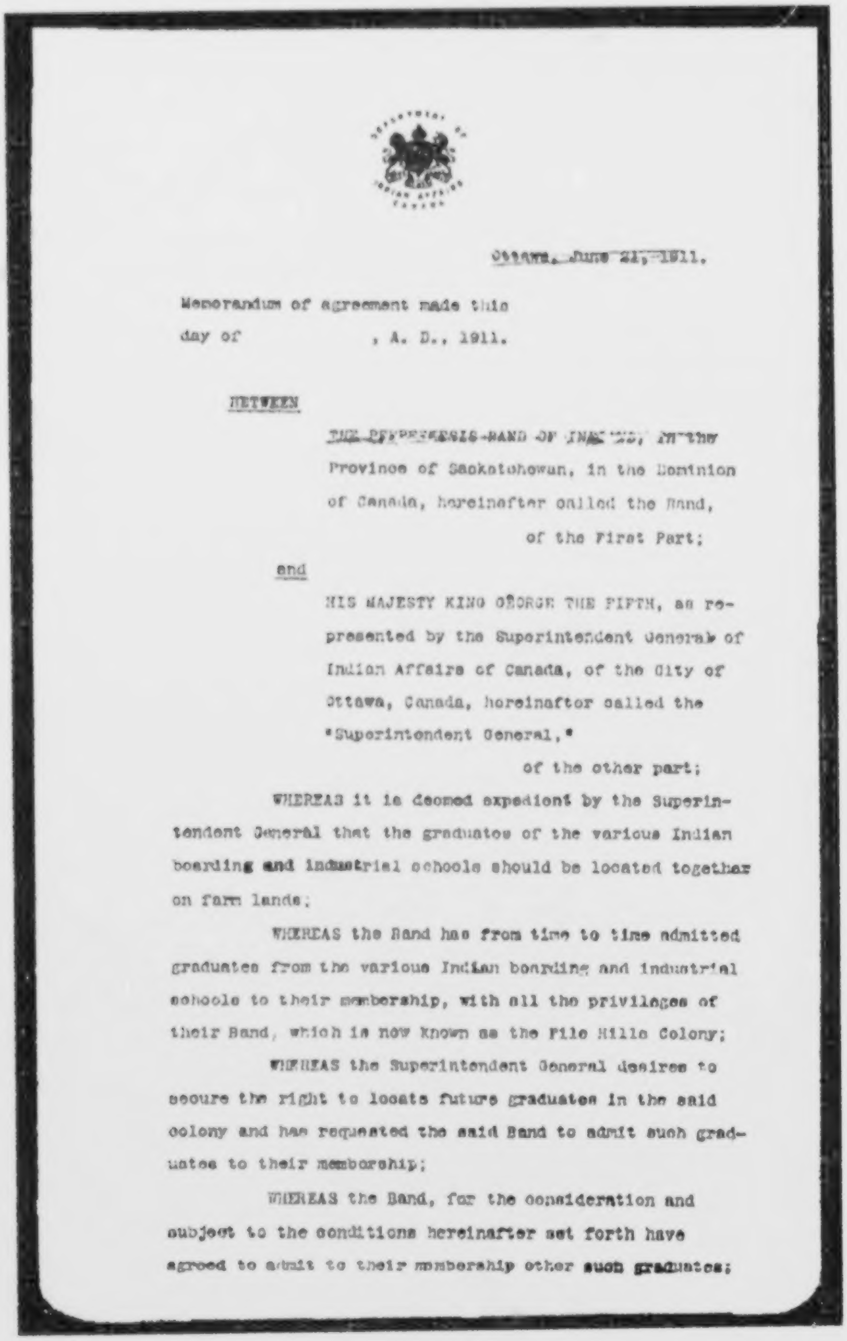
The formal record for the Peepeekisis First Nation Inquiry File Hills Colony Claim consists of the following materials:

- the documentary records (4 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2 - 15 tendered during the inquiry
- transcript of community session (2 volumes) (Exhibit 5a)
- transcript of interim hearing (1 volume) (Exhibit 15)
- transcript of oral session (1 volume)
- written submissions of counsel for Canada and counsel for the Peepeekisis First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX E

THE 1911 "FIFTY PUPIL AGREEMENT"



Ottawa, June 21, 1911.

Memorandum of agreement made this
day of , A. D., 1911.

BETWEEN

THE PEEPEEKEESIS BAND OF INDIANS, in the Province of Saskatchewan, in the Dominion of Canada, hereinafter called the Band,

of the First Part;

and

HIS MAJESTY KING GEORGE THE FIFTH, as represented by the Superintendent General of Indian Affairs of Canada, of the City of Ottawa, Canada, hereinafter called the "Superintendent General,"

of the other part;

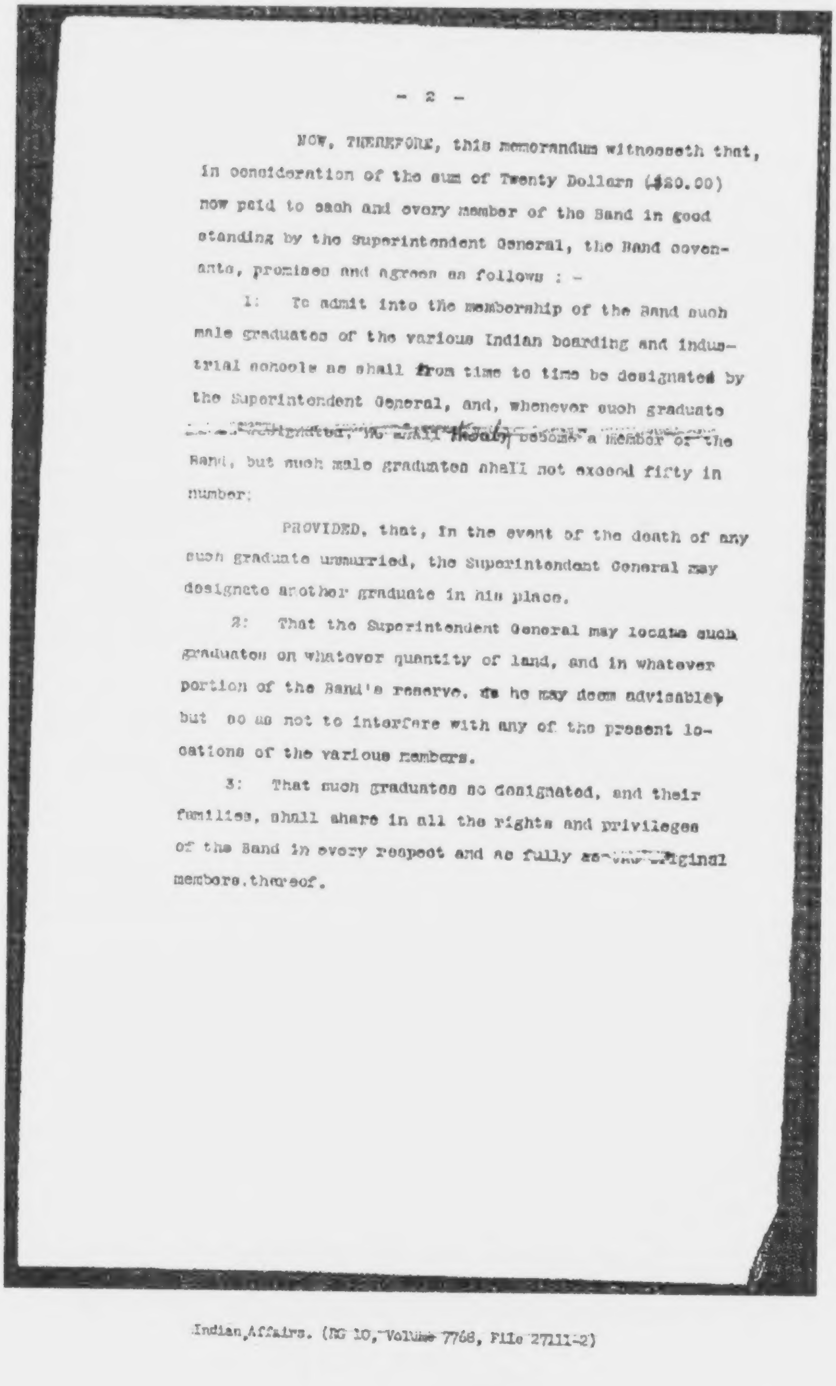
WHEREAS it is deemed expedient by the Superintendent General that the graduates of the various Indian boarding and industrial schools should be located together on farm lands;

WHEREAS the Band has from time to time admitted graduates from the various Indian boarding and industrial schools to their membership, with all the privileges of their Band, which is now known as the File Hills Colony;

WHEREAS the Superintendent General desires to secure the right to locate future graduates in the said colony and has requested the said Band to admit such graduates to their membership;

WHEREAS the Band, for the consideration and subject to the conditions hereinafter set forth have agreed to admit to their membership other such graduates;

Indian Affairs. (RG 10, Volume 7768, File 27111-2)



NOW, THEREFORE, this memorandum witnesseth that, in consideration of the sum of Twenty Dollars ($20.00) now paid to each and every member of the Band in good standing by the Superintendent General, the Band covenants, promises and agrees as follows : -

1: To admit into the membership of the Band such male graduates of the various Indian boarding and industrial schools as shall from time to time be designated by the Superintendent General, and, whenever such graduate is so designated, he shall thereby become a member of the Band, but such male graduates shall not exceed fifty in number;

PROVIDED, that, in the event of the death of any such graduate unmarried, the Superintendent General may designate another graduate in his place.

2: That the Superintendent General may locate such graduates on whatever quantity of land, and in whatever portion of the Band's reserve, as he may deem advisable, but so as not to interfere with any of the present locations of the various members.

3: That such graduates so designated, and their families, shall share in all the rights and privileges of the Band in every respect and as fully as the original members.thereof.

Indian Affairs. (RG 10, Volume 7768, File 27111-2)

APPENDIX F

DECISION OF JUDGE J.H. MCFADDEN, DECEMBER 13, 1956

December 13, 1956.

In the matter of The Indian Act,
Chapter 149, R.S.C. 1952, and
amendments thereto and in the
matter of the membership of
Alex Desnomie and other parties
in the Peepeekeesis Band.

DECISION OF J.H. McFADDEN, JUDGE
OF THE DISTRICT COURT OF THE
JUDICIAL DISTRICT OF MELVILLE.

IN THE MATTER OF
THE INDIAN ACT, CHAPTER 149
R.S.C. 1952 AND AMENDMENTS THERETO

- and -

IN THE MATTER OF THE MEMBERSHIP
IN THE PEEPEEKEESIS BAND OF:

1. Alex Desnomie
2. Celina Desnomie
3. Widow Joe McNabb
4. Widow Joe McKay
5. Fred Deiter
6. John Thomas
7. James Stonechild
8. Roy Keewatin
9. Mark Ward
10. William Ward
11. Norman Keewatin
12. William Bellegarde
13. Francis Dumont
14. Clifford Pinay
15. Joseph Ironquill
16. Henry McLeod
17. Mary Brass
18. Magloire Bellegarde
19. Pat Lacree
20. Moise Bellegarde
21. David Bird
22. Noel Pinay
23. Prisque Lacree
24. Albert Daniels
25. Campbell Swanson

Ernest Goforth, Sr., for the protestors.
M.L. Tallant, for those protested.

December 13, 1956.

This is a Reference by the Registrar under The Indian Act for a review of his decisions by which, after investigation, he found that the first twenty-three parties above named were entitled to be registered as Indians in the Peepeekeesis Band and that the last two named and numbered herein 24 and 25 were not entitled to be registered as Indians in the Peepeekeesis Band. This Review covers all twenty-five cases. I shall deal to some extent with each case in the order named and later shall deal, more or less generally, with all the cases to which somewhat similar facts or points of law might apply.

NO. 1 ALEX DESNOMIE

> The Registrar's decision is based on the following: "He is a grandson of the late Louie Desnomie, admitted to the Peepeekeesis Band in 1885, and it has not been established that the late Louie Desnomie was not entitled to membership in the Peepeekeesis Band."

The weight of evidence appears to support the Registrar's decision. The 1885 Pay List shows the late Louie Desnomie under number 36 as a member of the Peepeekeesis Band. Joseph Desnomie, Louie's son, was a member of that Band appearing in the 1898 Pay List as number 45. The evidence of Fred Deiter is to the effect that Joseph was a member of the Peepeekeesis when he, Deiter, became a member thereof in 1903. Alex, the son of Joseph, was born about sixty years ago on the Peepeekeesis Reserve and appears on its Pay Lists as number 107. As the Registrar has said, it has not been established that the late Louie Desnomie was not entitled to membership in the Peepeekeesis Band. I find that the said Alex Desnomie is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 2 CELINA DESNOMIE

The Registrar's decision is based on the following:

> "Her late husband, Gabriel Desnomie, was the son of the late Louie Desnomie, who appeared on the Peepeekeesis annuity pay list in 1885, and it has not been established that the late Louie Desnomie was not properly registered as a member of the Peepeekeesis Band."

The facts in this case are similar to those in the case of Alex Desnomie, Celina being the widow of Gabriel Desnomie, brother of Joseph Desnomie. The weight of evidence appears to support the Registrar's decision. I find that the said Celina Desnomie is, in accordance with the provisions of the Act, entitled to have her name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 3 WIDOW JOE McNABB

The Registrar's decision is based on the following:

> "Her husband, the late Joe McNabb, was included in the Peepeekeesis membership list in 1898. While records and other evidence does not disclose exactly how he was admitted to Peepeekeesis Band, it has not been established that the requirements of the Indian Act were not complied with."

The documentary evidence --- the 1898 Pay List of the Peepeekeesis Band --- supports the Registrar's decision. In those early days the records might not have been kept as well as in later years but the 1898 Pay List makes it quite clear that Joseph McNabb and his wife were members of the Peepeekeesis Band, both having come from Duck Lake Agency. I find that the said Widow Joe McNabb is, in accordance with the provisions of the Act, entitled to have her name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 4 WIDOW JOE McKAY

The Registrar's decision is based on the following:

> "Her husband, the late Joe McKay, was transferred from St. Peter's to the Peepeekeesis Band in July, 1903, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I find that the Registrar has arrived at a correct decision. There is on file and before me a departmental document which reads as follows:

> "Consent of Band to Transfer of Joe McKay to Peepeekesis Band
>
> Peepeekesis Indian Reserve,
> Qu'Appelle Agency,
> 12th June 1903.
>
> We, the undersigned Chiefs and Councillors of the Band of Indians owning the Reserve situated in Treaty No. Four and known as "Peepeekesis Reserve," do, by these presents, certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose according to the rules of the Band, and held in the presence of the Indian Agent for the locality on the 12th day of June 189_, granted leave to Joe McKay join our said Band, and as a member thereof to share in all land and other privileges of the Band, to which admission we the undersigned also give full consent.

Witnessed:	Tommy Fisher	His x Mark	Chief
L. Ashdown A. H. Miles M. Ward.	Buffalo Bow	His x Mark	Councillor
Certified Correct, W.M. Graham Indian Agent.	Yellow Bird	His x Mark	Councillor
Form No. 83.			Councillor

The departmental file --- the correspondence therein ---- shows further that the transfer was duly approved by the Superintendent General of Indian Affairs. His, Joe McKay's, name appears on the Peepeekeesis Pay List of 1903. I find that the said Widow Joe McKay is, in accordance with the provisions of the Act, entitled to have her name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

At this point I wish to say that in several other cases which will be dealt with in this decision, a number of completed forms entitled "Consent of Band to Transfer" will be before me, some of which forms are signed by three and some by more than three parties sometimes referred to as Chiefs or Councillors (or rather on the line or lines so designated in the printed forms) and sometimes on forms not so designated and still in other cases signed but not opposite the designation "Chief" or "Councillor" indicating, it would seem, that they signed as Band members only. To avoid repetition at a later time I point out now that in none of the Indian Acts applicable to the particular cases in question does there appear any provision that all voting members present were actually to sign the Consents to Transfer. The consents on file do indicate that the new members referred to in the Consents were voted into the Band by a majority of its voting members present at a meeting summoned for that purpose according to the rules of the Band and held in the presence of the Indian Agent.

NO. 5 FRED DEITER

The Registrar's decision is based on the following:

> "He was transferred from the Okanese to the Peepeekeesis Band in July 1903, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of the Band to Transfer" and approval thereof by the

Superintendent General is on file. I find that the said Fred Deiter is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 6 JOHN THOMAS

The Registrar's decision is based on the following:

> "The late John Thomas was transferred from St. Peter's to Peepeekeesis Band in July 1903, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of the Band to Transfer" and approval thereof by the Superintendent General is on file. I find that the said John Thomas is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 7 JAMES STONECHILD

The Registrar's decision is based on the following:

> "The records disclose that the late Ben Stonechild, father of James Stonechild, was transferred from the Okanese to the Peepeekeesis Band in 1903 with the approval of the Band and Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" Ben Asineeawasis, a Cree Indian name meaning Ben Stonechild in English, and approval thereof by the Superintendent General is on file. I find that the said James Stonechild is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Registrar as a member of the Peepeekeesis Band.

NO. 8 Roy Keewatin

The Registrar's decision is based on the following:

> "He was transferred from the Okanese to the Peepeekeesis Band in August 1904, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" and approval thereof by the Department is on file. I find that the said Roy Keewatin is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 9 MARK WARD

The Registrar's decision is based on the following:

> "The records disclose that Mark Ward was transferred from the Okanese Band to the Peepeekeesis Band in 1905 with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" and approval thereof by the Department is on file. I find that the said Mark Ward is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 10 WILLIAM WARD

The Registrar's decision is based on the following:

> "The records disclose that the late Mark Ward, father of William Ward, was transferred from the Okanese Band to the Peepeekeesis Band in 1905, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" Mark Ward, father of this William Ward, is as above stated, on file and approved by the Department. I note that such Consent like some of the others on file, has been amended to read "We, the undersigned members of the Band" rather than as originally printed"We, the undersigned Chief and Councillors of the Band" but for the reasons as already stated the Consent as filed shows that Mark Ward was admitted properly to the Peepeekeesis Band. I find that the said William Ward is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 11 NORMAN KEEWATIN

The Registrar's decision is based on the following:

> "The records disclose that the late George Keewatin, father of Norman, was transferred from the Okanese to the Peepeekeesis Band in 1905 with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" George Keewatin, father of Norman

Keewatin, and approval thereof by the Department, is on file. Norman was born and has always lived on this Reserve. His father died while he, Norman, was very young. His mother later married one Ed. Sanderson who was or later became a member of the Peepeekeesis Band. Norman appears for a time on the Pay Lists as a member of the Sanderson family (that is, as a stepson of Ed. Sanderson, as he was) and at least since and including 1939 has appeared under his own name on the Peepeekeesis Pay List as No. 192. I find that the said Norman Keewatin is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 12. WILLIAM BELLEGARDE

The Registrar's decision is based on the following:

> "The records disclose that the late John Bellegarde, father of William Bellegarde, was transferred from Little Black Bear Band to Peepeekeesis Band in 1905 with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" John Bellegarde, father of William Bellegarde, and approval thereof by the Department, is on file. John Bellegarde appears on the 1906 Pay List and William Bellegarde on the 1930 Pay List. I find that the said William Bellegarde is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 13 FRANCIS DUMONT

The Registrar's decision is based on the following:

> "He was transferred from the Okanese to the Peepeekeesis Band in July 1905, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" and approval thereof by the Department is on file. His name appears on the Pay List of 1906. I find that the said Francis Dumont is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 14 CLIFFORD PINAY

The Registrar's decision is based on the following:

> "The records disclose that he was transferred ~~from~~ Sakimay Band to Peepeekeesis Band in 1906 with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" and approval thereof by the Department is on file. His name appears on the 1907 Pay List. I find that the said Clifford Pinay is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 15 JOSEPH IRONQUILL

The Registrar's decision is based on the following:

> "He was transferred from the Gordon's Band to the Peepeekeesis Band in August 1906, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" and approval thereof by the Department, is on file. His name appears on the 1907 Pay List. Ifind that the said Joseph Ironquill is, in accordance with the provision of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 16 HENRY McLEOD

The Registrar's decision is based on the following:

> "The records disclose that he was transferred from Pine Creek to Peepeekeesis Band in July 1908, with the approval of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal Consent or rather a copy of "Consent of Band to Transfer" dated June 11, 1908, and approval thereof by the Department is on file. In this case, and in the cases of Alex Brass and Alfred Swanson to which reference will be made later, the Department has been unable to locate the original Consents. In each such case I accept the copy contained in the Departmental file it being clear from the letters approving such transfers that such copies were prepared from the originals at the time the copies were made. Henry McLeod appears as number 89 on the Pay List of 1908. I find that the said Henry McLeod is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 17 MARY BRASS

The Registrar's decision is based on the following:

> "The records disclose that the late Alex Brass, husband of Mary Brass, was transferred from the Key Band to Peepeekeesis Band in 1908, with the consent of the Band and the Department, and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A copy (which as I have said I accept in place of the original) of formal "Consent of Band to Transfer" Alex Brass from the Keys Band to the Peepeekeesis and approval thereof by the Department is on file. The name of Alex Brass appears in the Peepeekeesis Pay List of 1908 as number 87. I find that the said Mary Brass is, in accordance with the provisions of the Act, entitled to have her name included (remain) in the Indian Register as a member of the Peepeekeesis Band.

NO. 18. MAGLOIRE BELLEGARDE

The Registrar's decision is based on the following:

> "The records disclose that he was transferred from Little Black Bear to Peepeekeesis Band in 1909 with the approval of the Band and the Department and it has not been established that the requirements of the Indian Act were not complied with."

I agree with the Registrar in his decision. A formal "Consent of Band to Transfer" dated April 20, 1909, and approval thereof by the Department is on file. Magloire Bellegarde appears in the 1909 Pay List of the Peepeekeesis as number 91. I find that the said Magloire Bellegarde is, in accordance with the provisions of the Act, entitled to have his name included (remain) in the Indian Register as a member of the Peepeekeesis Band. It seems that in this case of Magloire Bellegarde, as in some other cases before me herein, the parties originally named have died. In order to avoid any confusion I am using in each case the names as set out in the Registrar's decisions.

So far I have dealt with the Registrar's decisions as to the first eighteen parties above named whom the Registrar held were entitled to be registered as Indians in the Peepeekeesis Band. I now shall deal with the next five parties, numbered 19 to 23, both inclusive whom the Registrar also held entitled to be registered as Indians in the Peepeekeesis Band. The reasons given by the Registrar for that or those findings are as follows:

NO. 19. PAT LACREE

> "He was transferred from the Little Black Bear Band to the Peepeekeesis Band under the terms of the 1911 agreement."

NO. 20. MOISE BELLEGARDE

> "The records disclose that he was transferred from the Little Black Bear Band to the Peepeekeesis Band in 1912 under the terms of the 1911 agreement."

NO. 21. DAVID BIRD

> "The records disclose that he was transferred from the Cote Band to the Peepeekeesis Band in 1912 under the terms of the 1911 agreement."

NO. 22. NOEL PINAY

"The records disclose that he was transferred from the Sakimay Band to the Peepeekeesis Band in 1912 under the terms of the 1911 agreement."

NO. 23. PRISQUE LACREE

"He was transferred from Little Black Bear Band to Peepeekeesis Band in 1912 under the terms of the 1911 agreement."

These five cases are not entirely like the first eighteen cases above dealt with. The Registrar has based his decisions on the ground that these five parties were admitted to membership under the 1911 agreement. The original of that agreement is before me in the Departmental file and in order that its contents will be fully known to anyone interested in reading this decision, or in hearing it read as I am now reading it, I quote hereunder such agreement in its entirety.

"Memorandum of agreement made this 29th day of July, A.D. 1911.

BETWEEN

The Peepeekeesis Band of Indians, in the Province of Saskatchewan, in the Dominion of Canada, hereinafter called the Band,

of the First Part:

AND

His Majesty King George the Fifth, as represented by the Superintendent General of Indian Affairs of Canada, of the City of Ottawa, Canada, hereinafter called the "Superintendent General",

of the other part:

Whereas it is deemed expedient by the Superintendent General that the graduates of the various Indian boarding and industrial schools should be located together on farm lands;

Whereas the Band has from time to time admitted graduates from the various Indian boarding and industrial schools to their membership, with all the privileges of their Band, which is known as the File Hills Colony;

Whereas the Superintendent General desires to secure the right to locate future graduates in the said colony and has requested the said Band to admit such graduates to their membership;

Whereas the Band, for the consideration and subject to the conditions hereinafter set forth have agreed to admit to their membership other such graduates:

Now, therefore, this memorandum witnesseth that, in consideration of the sum of Twenty Dollars ($20.00) now paid to each and every member of the Band in good standing by the Superintendent General, the Band covenants promises and agrees as follows:

1. To admit into membership of the Band such male graduates of the various Indian boarding and industrial schools as shall from time to time be designated by the Superintendent General, and, whenever such graduate is so designated, he shall thereby become a member of the Band, but such male graduates shall not exceed fifty in number;

Provided, that, in the event of the death of any such graduate unmarried, the Superintendent General may designate another graduate in his place.

2. That the Superintendent General may locate such graduates on whatever quantity of land, and in whatever portion of the Band's reserve, he may deem advisable, but so as not to interfere with any of the present locations of the various members.

3. That such graduates so designated, and their families, shall share in all the rights and privileges of the Band in every

respect and as fully as the original members thereof.

"J.D. McLean"

Asst. Deputy Superintendent General
of Indian Affairs.

"Jose McNabb"	
"Henry McLeod"	
"Joseph McKay"	"George Keewaydin"
"Ernest Goforth"	"Roy Keewaydin"
"J.L. Moore"	"Robert Akapew"
"A. Brass"	
"Fred Deiter"	
"J.R. Thomas"	
"Clifford Pinay"	

In pursuance of that 1911 agreement the sum of twenty dollars was paid to each and every then-member of the Peepeekeesis Band, including men, women and children, in some cases the amounts payable to wives and children being paid to the husband or father on their behalf, and in other cases the amounts payable to children being paid to the mother on their behalf. A total sum of $3000.00 was paid to the one hundred and fifty members under that agreement. Only one member, Louie Desnomie, refused to accept the money. The receipts for all the payments are before me in the Departmental file. While I have been unable to find any specific provision in the Indian Act of that date authorizing an agreement of that kind, the agreement appears to have been considered, or rather I assume was considered, by the Department as a general vote of the majority of the members of the Band delegating to the Superintendent General the right to name, choose or designate the particular school graduates whom he might wish to place or join the Peepeekeesis Band. I regret that the Department did not arrange to have counsel appear before me on this Review to speak particularly as to that 1911 agreement and generally as to other matters that arose during the hearing. Whether or not on this Review I have jurisdiction to determine the validity or invalidity of that agreement I am not too definite in my opinion. If I have jurisdiction in that regard, I am not prepared to say that I consider the agreement to be valid beyond question but I have arrived at the conclusion that it is valid rather than invalid. I further hold that insofar as that 1911 agreement is concerned the protestors or those whom they represent are estopped, as against those protested, from pleading such 1911 agreement as being invalid. Among the protestors who signed that 1911 agreement is Ernest Goforth Sr who has appeared on this Review for himself and the other protestors. He was by no means an illiterate man (in fact he was a very well-educated man) when he signed that agreement and accepted the $20.00 due him thereunder. The above named parties who were admitted into the Band under that agreement entered or accepted membership in the Band in good faith on their part, relied on the validity of the 1911 agreement and planned and lived their lives with their wives and families on that Reserve which they, from the time of their admission into the Band, felt to be their rightful home. It is needless to mention the tragedy of their being uprooted and evicted with their wives and families from the Reserve after all their many years of residence thereon. The evidence is clear that Pat Lacree, David Bird, Noel Pinay and Prisque Lacree were all "graduates" within the meaning of the 1911 agreement. They appear to have been properly admitted under the 1911 agreement. The evidence as to Moise Bellegarde being a graduate is not clear one way or the other. He was not called as a witness before me and does not appear to have been questioned in that regard before the Commissione He appears on the 1912 Pay List under number 101 and in the absence of anything specific to the contrary I do not feel that I should reverse the Registrar's finding that he is entitled to be registered as an Indian in the Peepeekeesis Band having been transferred from the Little Black Bear Band in 1912 under the terms of the 1911 agreement.

Apart entirely from the 1911 agreement and regardless as to its validity or invalidity, I find that Pat Lacree, Moise Bellegarde, David Bird, Noel Pinay and Prisque Lacree are, in accordance with the provisions of the Act, entitled to have their names included (remain) in the Indian Register as members of the Peepeekeesis Band. They are entitled to be registered coming as they do within the provisions of Section 11 of the Act -- the present Indian Act. They are all members of the Peepeekeesis Band, "member of a band" being defined by Section 2 (1) (j) of the Act as "a person whose name appears on a Band List..." All their names appear on the Band List. The very able and lucid decision of Buchanan C.J.D.C. under the Indian Act, In re Wilson, 1954, 12 W.W.R. N.S. 676 at 684 and following pages, is, under that particular section 11, right to the point insofar as the cases now before me are concerned. To quote briefly from that decision:

> "The details of Wilson's personal history and of his association with the Beaver Band having been set out, we are now in a position to consider sec. 11 of the Act, which reads thus:
>
> "Subject to section twelve, a person is entitled to be registered if that person
>
> "(a) not applicable here.
>
> "(b) is a member of a band
>
> "(i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or
>
> "(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,
>
> "(c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b), or
>
> "(d) is the legitimate child of
>
> "(i) a male person described in paragraph (a) or (b), or
>
> "(ii)a person described in paragraph (c),
>
> "(e) is the illegitimate child ..... (not applicable here)

> "(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e)."

"If Wilson's contention that he is entitled to be registered is to be sustained, he must bring himself within one of the six classes or categories (a) to (f) inclusive of this section.

"It should be noted that sec. 12 of the Act which lists the persons not entitled under any circumstances to be registered in the Indian register, does not affect either the argument or the Court's decision since admittedly Wilson does not fall within any of the five classes described in sec. 12. We may therefore deal with sec. 11 without regard to sec. 12...................

"........ This interpretation moreover has the eminent recommendation that it gives a fair and just meaning to the clause (he was referring to sec. 11 (b)); in effect it raises a self-imposed estoppel against the crown -- let membership once be established and the status of "the member" is beyond challenge.

....

"I hold therefore that Wilson was, and is, a member of a band as defined in sec. 11 (b) and is entitled to be registered."

While I have found the first eighteen named parties are, in accordance with the provisions of the Act and for the reasons as stated, entitled to have their names included (remain) in the Indian Register as members of the Peepeekeesis Band, I find too that all such eighteen parties are entitled to be so registered for the additional reason that they all, as members of the Band, come within the provisions of section 11 of the Act as do the said five parties numbered 19 to 23 both inclusive.

No. 25 CAMPBELL SWANSON

I shall deal with this case before that of Albert Daniels

No. 24. The Registrar's decision is that Campbell Swanson is not entitled to be registered as an Indian in the Peepeekoesis Band and his reason for that decision is as follows:

> "The evidence available indicates that the parents of the late Alfred Swanson, father of Campbell Swanson, were of non-Indian status. Therefore, the late Alfred Swanson and his son, Campbell Swanson, could not qualify for membership in an Indian Band in accordance with the provisions of Section 11 of the Indian Act."

It appears to me that for more than one reason the Registrar has arrived at a wrong decision in this case. There is before me in the Departmental file a copy of the usual formal "Consent of Band to Transfer" Alfred Swanson to the Peepeekeesis Band which is dated June 11, 1908, is signed by eight members of the Band who certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose according to the rules of the Band, and held in the presence of the Indian Agent. The Consent is certified as being correct by W.M. Graham as Indian Agent. While it is true that such Consent does not set out the name of the Band to which he formerly belonged that omission in itself does not invalidate the consent, no statutory form of consent being required by the Act. The file discloses that that consent, together with five others concerning other parties, was sent by the Inspector of Indian Agencies, Balcarres, on June 18, 1908, to the Indian Commissioner at Winnipeg. That letter states that Alfred Swanson and Elijah Dickson were from Brandon School and were admitted with the authority of the Department. They were, of course, as has been said, also admitted by vote of the Band. There is on the Departmental file a letter dated June 29, 1908, from the Indian Commissioner at Winnipeg to the Department at Ottawa recommending the admission of the six persons to the Peepeekeesis Band and under date of July 6, 1908, the Department at Ottawa wrote the Indian

Commissioner at Winnipeg approving of the admission of Such parties including that of Alfred Swanson. Alfred Swanson accordingly became a member of the Band and it appears continued on its Pay Lists until his death many years later. His son Campbell Swanson was born on this Peepeekeesis Reserve about forty-four years ago and has continued to be a member of the Band.

I have had during this Review the advantage of perusing several Departmental files. One of such contains a letter dated at Balcarres, June 6, 1910, written by W.M. Graham, Inspector of Indian Agencies to the Secretary, Department of Indian Affairs at Ottawa, which reads as follows:

> "Sir,
>
> The Rev. Mr. Ferrier, Principal of the Brandon Industrial School has written to me asking if there is any chance for boys who have received scrip (pupils of this school) being admitted to the Colony. As this is a matter for you to decide, I am referring it to you. I am aware that each case has to be dealt with on its merits but I do not know whether the fact that they take scrip will debar them."

and in reply to that letter the Secretary wrote the Inspector under date of June 15, 1910, as follows:

> "I have to acknowledge the receipt of your letter of the 6th instant stating that you have been requested by the Principal of the Brandon Industrial School to apply for admission of boys who have received scrip (pupils of his school) to the File Hills Colony. In reply I beg to say that pupils who receive scrip are not Indians and, therefore, cannot be located on an Indian Reserve."

That correspondence and other correspondence in the departmental files indicates how carefully the Department proceeded in approving the admission of new members into the Band. I do not think that I should assume that the Department failed to look into the status of Alfred Swanson before approving of his admission. Very strong evidence should be required to find the Department negligent in that respect and I cannot see that such evidence is apparent in this case. Inspector Graham's letter of June 18, 1908, to the Indian Commissioner at Winnipeg states that Alfred Swanson and Elijah Dickson were admitted with the authority of the Department. It is clear too that Campbell Swanson comes within the provisions of section 11 of the Act. I find that the said Campbell Swanson is, in accordance with the provisions of the Act, entitled to have his name included (remain or restored) in the Indian Register as a member of the Peepeekeesis Band. Neither he nor any of the parties numbered one to twenty-three, both inclusive, come within section 12 of the Act which concerns persons not entitled to be registered.

NO. 24. ALBERT DANIELS

The Registrar's decision in this case is that Albert Daniels is not entitled to be registered as an Indian in the Peepeekeesis Band for the following reasons:

> "The records disclose that he was admitted to membership in the Peepeekeesis Band in 1931 under the terms of the 1911 agreement. His evidence at the commission hearing disclosed that he had never attended an Indian School. Therefore, he could not qualify for admission to the Peepeekeesis Band under the 1911 agreement. Furthermore, the evidence available indicates that his father, the late Joseph Daniels, was not of Indian status and received a patent for the S.W.¼ of 30-22-11 West of the 2nd in 1907."

I am of opinion that the Registrar, under all the circumstances in this case, has not arrived at a correct decision -- a correct conclusion. The evidence of Daniels himself, given frankly and, beyond question, truthfully as far as he was aware, is that he is not a graduate of an Indian school and that his father, Joseph Daniels, "proved up" on the S.W. 30-22-11 W 2nd and later sold it. He says further (for what it is worth, if anything) that neither his father nor his mother were members of a Band so far as his knowledge goes but that his grandparents in the United States (Montana) did belong to a Reserve. He says that his parents were part Indian and part halfbreed -- that they were Metis. His evidence in explaining how he became a member of the Peepeekeesis Band is, in part, to the effect that previous to 1932 he had been working on the Reserve running a farm for Jack Fisher; that they put him off and put Jack Fisher's son-in-law in his place and he had to get out; that Fisher's son-in-law couldn't make a go of it and that they came back and got him (Daniels) when he was working on Mr. Graham's farm; that Mr. Dodds was Indian Agent at that time and that Mr. Graham was then (1932) Inspector of Indian Affairs; that he does not know whether there was any kind of a vote taken to get him into the Band by the members but followed that statement by saying there wasn't any vote. He is of opinion that he was taken in under the 1911 agreement Mr. Graham thinking that he didn't need to get any votes for that.

Mr. McCrimmon in giving evidence before the Commissioner was asked the following question and gave the following answer:

> "Q. Have you been able to find the first appearance of one Albert Daniels on the Annual Treaty Pay List of the Band?
>
> "A. The first reference to Albert Daniels is in the 1923 Paylist, and under number 128 appears the name of Mrs. Albert Daniels, formerly Justine Desnomie; and on that Paylist is also a notation that she is married to a nontreaty halfbreed, and up to 1932, she was paid alone. In 1932, Albert

and five children are included."

he 1932 Pay List which is before me shows under number
e of Mrs. Albert Daniels and under the "Remarks"
he tation "A. Daniels admitted to Peepeekeesis
. Comm. Graham's letter 314 - 11B 6-8-1931." As Mr.
as said the five children are included. The next Pay
have before me following that of 1932 is that of
ch latter list and under number 128 Albert Daniels
head of the family and he has continued as such to the
e. I think it very important to consider section 16
an Act of that time which from the official office
on before me appears to have been as follows:

lf-breed in Manitoba who has
d in the distribution of half-
lands shall be accounted an
n

As to half-
breeds in
Manitoba.

lf-breed head of a family,
t the widow of an Indian or a
breed who has already been
ted into a treaty, shall, unless
very special circumstances,
shall be determined by the
intendent General (Minister) or
gent, be accounted an Indian or
led to be admitted into any
n treaty.

Half-breed
heads of
families

alf-breed who has been admitted
a eaty shall, on obtaining
onsent in writing of the Super-
dent General (Minister), be
ed to withdraw therefrom on
fying his desire so to do in
ng, signed by him in the presence

Withdrawal
from treaty.

> of two witnesses, who shall attest his signature on oath before some person authorised by law to administer such oath.
>
> "4. Such withdrawal shall include the wife and minor unmarried children of such half-breed."
>
> Wife and minor children.

It should be noted that the first part of that section applies to Manitoba only -- to half-breeds in Manitoba. The balance of the section is general in its provisions and there is no such provincial restriction. Section 16(2) made it permissible, in 1933 or subsequent years, for a half-breed head of a family who had already been admitted into a treaty, as Daniels had been admitte in 1931 or 1932, to be accounted an Indian and, I take it, to be placed on the Pay List, as head of the family as Daniels does appear in the 1939 Pay List and I assume on the Pay Lists for some years previous to that time. It might be that Daniels was admitted to the Peepeekeesis Band under that particular section -- under very specia circumstances which were determined by the Minister and not at all or entirely under the 1911 agreement. The 1931 letter of Commission Graham to which reference has been made relative to the admission of Daniels to the Band could not be located. There might or there might not have been reference in it to the 1911 agreement. The notation in the Pay List does not refer to such agreement and apart from the somewhat uncertain reference made to it by Daniels himself there seems no other evidence that he was admitted to the Band under the terms of that agreement as distinct from some procedure that might have been taken under section 16 of the Act of that time.

Overlooking for the moment section 12 of the Act it seems clear that Daniels comes within section 11 and therefore is a person entitled to be registered. He is "a member of a band" as set out therein under the definition thereof as set out in section 2(1)(j) of the Act. The decision on that point of Buchanan C.J.D.C. In re Wilson to which I have referred above, and which I adopt, appears to apply herein. To make one further reference to that decision as reported at page 686:

> "there must be a band membership which, once established, cannot be impugned on any grounds."

In other words, Albert Daniels rightly or wrongly (and I am satisfied rightly and in the best of faith on his part) became a member of the Peepeekeesis Band and unless he must be removed under section 12 he is entitled to remain as a member of that Band. I shall now undertake an examination of section 12 of the Act to determine whether or not ~~si~~ IT deprives Daniels of what I consider to be his legal rights -- vested rights -- acquired when some twenty-five years ago he became a member of the Peepeekeesis Band.

I must confess that from the beginning (the time some months ago when these matters were first referred to me for review) I could foresee considerable difficulty in arriving at a decision as to whether or not section 12 was to b made applicable to any of the cases which I had been called upon to review. With that difficulty later to be met I proceeded to refresh my mind as to the principles to be considered in reaching a proper interpretation of statutory enactments. I used as my principal guide the authoritive work "Maxwell on the Interpretation of Statutes, ninth Edition by Sir Gilbert Jackson" and before attempting to apply any of such principles to this case of Albert Daniels, I shall quote briefly from the aforesaid text and perhaps by so doing be better able to apply or to refrain from applying the provisions of section 12.

" Retrospective Operation "

> Page 221. "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation .... They are construed as operating only in cases

or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary or distinct implication."

Page 222. "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the anactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. But if the language is plainly retrospective it must be so interpreted. At the same time it is laid down that regard must be paid to the dominant intention..... A statute is not to be construed to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain. For it is to be observed that the retrospective effect of a statute may be partial in its operation....."

"Retrospective Operation as regards Vested Rights." Pages 222 and 223. "It is chiefly where the enactment would prejudically affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes

> a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. Where vested rights are affected prima facie it is not a question of procedure. There is nothing intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon and being entitled to act upon the law as it stood before the new Act came into operation......."

" Pending Actions"

> Page 229. "In general when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights."

"Presumption against Intending
Injustice or Absurdity."

> Page 207. "A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words."

Coming back to section 12 of the Act, it is clear that Albert Daniels, if he comes within that section at all, comes under it as being a descendent of a person who has been alloted half-breed lands -- that is, as a son of Joseph Daniels who in 1907 appears to have been allotted the S.W.½ of 30-22-11 W2nd. However, it is very important to note that on August 14, 1956, section 12 of the Act was amended by adding thereto subsection (3) which reads as follows:

> "(3) This section applies only to persons born after the coming into force of this Act."

That amendment, if applicable to Daniels, very definitely excludes him from the operation of section 12. The present Act came into force in 1951 - five years ago - and Daniels now being sixty-four years old is clearly not affected. Perhaps that is all there is to it, that is, perhaps Parliament in the first place (that is, when passing the Act in 1951) intended what it has said in the 1956 amendment. Section 21 (2) of The Interpretation Act, Chapter 158 R.S.C. 1952 reads as follows:

> "21 (2). The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended,"

and section 22 of said Interpretation Act, reads as follows:

> "22. An amending Act shall, so far as is consistent with the tenor thereof, be construed as one with the Act that it amends."

From the above it would seem that I am not prevented from concluding, should I consider it right and proper that I do so, that in passing the amendment Parliament's purpose was intended merely to make clear what it had intended in the first place --- that section 12 was not to become operative so as to destroy, annul or otherwise interfere with rights acquired by certain individuals before the coming into force of the 1951 Act or, in fact, as given by or confirmed under section 11 of the Act. One should note too that section 12 (iv) is quite definite in that it does not become operative for many years to come when it speaks of a person born of a marriage entered into after the 4th day of September, 1951, and has attained the age of twenty-one years. Apart from the 1956 amendment aforesaid which expressly states that section 12 applies only to persons born after the coming into force of the Act there is nothing whatever in the section to say it is to be retrospective in its operation -- nothing said expressly or, in my opinion, by necessary, or distinct implication as mentioned by Maxwell aforesaid. I do not conclude after a careful study of all the sections previous to sections 11 and 12 that section 12 requires to be retrospectively construed. The Act is intended to cover the future as well as the present -- in other words, as "always speaking." Section 10 of The Interpretation Act is as follows:

> "10. The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning."

I note that section 13 of the Act as enacted in 1951 was amended in 1956. That amendment has to do with the admission of Indians to a Band or their transfer from one Band to another Band. The 1951 provision permitted the admission or transfer with the consent of the Band or the Council of the Band. There is nothing in the amendment of 1956 to the effect that admissions or transfers made under the Act as it stood in 1951 are invalid and it seems that the same reasoning can be applied properly to the 1956 amendment as it relates to section 12, as well as to section 12 of the 1951 Act as it applies to band memberships over the years previous to that time. It seems that from now on (under the latest amendment) admissions or transfers are to be made with the consent of the council of a band and not as in the 1951 Act with the consent of the band or council of the band or as still more previously, such as in 1930, with a majority vote of a band or the council of a band.

I have dealt at some length with these reviews, particularly this of Albert Daniels due to the fact that it perhaps has presented more difficulty than any of the others. I have arrived at the decision that he is entitled to be registered (remain registered or to be reinstated) as an Indian in the Peepeekeesis Band. In arriving at that decision or perhaps more accurately I should say, as one reason, among others, for arriving at that decision -- the intention of Parliament perhaps not being clear -- I have taken into consideration, as under such circumstances Maxwell says I am privileged to do, the consequences to Albert Daniels if the Registrar's decision were permitted to stand. He, now an old man, together with his wife and minor children, would be deleted from the Band List as provided by section 10. Under section 15(2) they would not become entitled to receive from Her Majesty the payments which under section 15(1) are provided for those becoming enfranchised or who otherwise cease to be members of a Band. I am unable to conclude that Parliament ever intended that section 12 be construed so as to deprive a man in the position in which this man Daniels finds himself -- one who in good faith became a member of the Band so many years ago -- of the same consideration given to those who become enfranchised or who otherwise cease to be members of a Band. There is in section 15(4) provision, in the discretion of the Minister, for compensation for permanent improvements made to lands in a reserve but in large measure Daniels, his wife and minor children, could not be compensated for their loss of membership in the Peepeekeesis Band.

I have arrived at the point where, for the reasons as above stated, I am prepared to find, as I now do, that all twenty-five parties, numbered 1 to 25, whose cases are before me for review, are entitled to be registered as Indians in the Peepeekeesis Band.

Before concluding my remarks I feel that I should refer to one or two other matters which were brought to my attention during these hearings. Each of the twenty-five Protests filed with the Registrar, one against each of the twenty-five parties, purports to be signed by ten members of the Peepeekeesis Band including the names of "Koochicum" and "Mrs. Koochicum". It was established on the Investigation held at Lorlie in 1954 that the "Koochicum" who signed the protest by making his mark was one "Charlie Koochicum" whose name does not appear at all on the photostatic copy of the list as posted. The protestors could have noted by an inspection of the list as posted that Charlie Koochicum's name did not appear thereon either as "Charlie Koochicum" or just as "Koochicum" and that therefore he "Koochicum" as he signed the protest or as "Charlie Koochicum" his full name, was not an "elector" within the meaning of the Act or in the alternative that the proper list had not been posted. Mr. Tallant, for those protested, made that objection very clearly before the Commissioner on the Investigation and reiterated the objection before me on these hearings. Mr. Tallant submits that all twenty-five protests have been signed by nine electors only rather than by ten as required by section 9 of the Act; that they are not in order and should not have been considered as protests under the Act. The evidence given before me on these hearings does show that Koochicum's (meaning Charlie Koochicum) name appears in the band list in existence in the Department when the Act came into force in 1951. It seems that in making a copy of that list, for the purpose of making photostatic copies for posting, a slight error was made by showing the name "Minnie" immediately opposite, on the same line, following the surname "Koochicum" thereby showing what would be considered (without evidence to the contrary) one elector only -- Minnie Koochicum -- rather than by dropping the name "Minnie" one space (Minnie being Koochicum's wife) and thereby showing the two names -- Mr. and Mrs. Koochicum who signed the protests -- as electors. It is apparent that section 8 cannot be carried out to the letter it being impossible to post the official departmental Band List in more than one place at the one time as required by the Act and therefore to comply as far as possible with the Act copies of the list would need to be posted. Due to the fact that I have reached my decisions in all these cases on grounds other than the regularity or irregularity or otherwise of the lists as posted or as to the proper or improper posting of the list as required by the Act, it seems unnecessary that I make any finding on such points.

There is a further point that was raised before me by Mr. Tallant and to which I should make some reference, that is, The Limitation of Actions Act, Chapter 76 R.S.S. 1953. There is, under that Act, as is almost common knowledge, a limitation period for taking legal proceedings - generally but not always a six year period after the cause of action arose. The cases before me if they come at all under that Act would come under section 3(1)(j), a six year period provision. Statute law of that kind goes back very far into the past and without question is legislation for the general good of the public. There should be some cut-off date for all when one can be called upon to meet legal proceedings taken against him. Memories fail, witnesses die and circumstances change with the passing of time. The statute is in the nature of defence legislation and must be pleaded as such if one is to be given the protection under it which the Legislature had in mind. In all these cases Mr. Tallant pleaded or raised the Statute as a defence or prohibition against the protests filed against his clients due in some cases to events that occured fifty or sixty years ago and in no case less than twenty years ago.

Section 87 of the Indian Act reads as follows:

> "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent

> that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

While in the Indian Acts previous to 1951 there was no provision exactly like that of section 9 of our present Act providing for protesting membership, there were provisions in those old Acts which were somewhat similar in nature and it might be that they are sufficiently similar to bring a set of circumstances (a cause of action) existing in their time within the provisions of The Limitation of Actions Act now in force in Saskatchewan. Section 1 of the 1887 amendment to the Indian Act is as follows:

> "The Superintendent General, may, from time to time, upon the report of an officer, or other person specially appointed by him to make an inquiry, determine who is or who is not a member of any band of Indians entitled to share in the property and annuities of the band; and the decision of the Superintendent General in any such matter shall be final and conclusive, subject to an appeal to the Governor in Council."

Section 18 of the 1906 Act contains the same provision as does section 18 of the Act as consolidated for office purposes in or following 1941. In other words, throughout all the old Acts there were provisions for determining the same questions and concerning the same parties that are before me in these cases. There is no evidence to the effect that any effort was made to have the questions determined under the provisions of the previous Acts. Perhaps all or some of them were so determined in which case the decision of the Superintendent General was final. any case, perhaps it can be argued that insofar as the cases before me are concerned (all old cases) the protestors are barred in their efforts by the said Limitation of Actions Act. Here again it is unnecessary that I make a decision on that point having decided all the cases on the other various grounds as mentioned.

I shall conclude by repeating that I find all twenty-five parties, numbered above 1 to 25, whose cases are before me for review, are entitled to have their names included (remain) in the Indian Register as members of the Peepeekeesis Band.

" J.H. McFadden "

Judge of the District Court
Judicial District of Melville.